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In The
Supreme Court of the United States

ARNOLD SCHWARZENEGGER, et al.,

Petitioners,

v.

JERRY VALDIVIA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do parolees in state administrative revocation hearings have a due process "confrontation right" to exclude hearsay, in the absence of a special showing of "good cause," when that hearsay would be admissible under the Confrontation Clause even against a defendant in a criminal prosecution?

LIST OF PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed are Arnold Schwarzenegger, in his official capacity as Governor of the State of California, and the California Department of Corrections and Rehabilitation.

Respondents are Jerry Valdivia, Alfred Yancy, and Hossie Welch, representing a class of California parolees.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Governor Arnold Schwarzenegger and the California Department of Corrections and Rehabilitation (the State Defendants), respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-32a) is reported at 599 F.3d 984 (9th Cir. 2010). The order denying the State Defendants' petition for rehearing en banc and dissenting opinion (App., *infra*, 80a-92a) are reported at 623 F.3d 849 (9th Cir. 2010). The Special Master's Report and Recommendation Regarding Motion to Enforce Paragraph 24 of the *Valdivia* Permanent Injunction, including the exhibits thereto (App., *infra*, 33a-76a), and the district court's Order Adopting Findings and Recommendations of the Special Master (App., *infra*, 77a-79a), are reported at 548 F. Supp. 2d 852 (E.D. Cal. 2008).

STATEMENT OF JURISDICTION

The original judgment of the court of appeals was entered on March 25, 2010, and the order and decision denying the petition for rehearing en banc was

entered on September 28, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

STATEMENT OF THE CASE

1. In *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), this Court held that, under the Fourteenth Amendment's Due Process Clause, parolees are entitled to a hearing before having their parole revoked. *Morrissey* identified, as among the minimum requirements to satisfy due process, a "right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)." *Id.* at 489. These minimum requirements were designed "to assure that the finding of a parole violation will be based on verified facts." *Id.* at 484. But this Court emphasized that parolees are not entitled to the full panoply of rights afforded criminal defendants, and that "there is no thought to equate [the revocation hearing] to a criminal prosecution in

any sense." *Id.* at 480, 489. Accordingly, "the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial." *Id.* at 489.

The following Term, in *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973), this Court explained, in the context of recognizing similar limited rights for probationers, "that we did not in *Morrissey* intend to prohibit use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence." *Id.* at 782.

2. In March 1994, respondent Jerry Valdivia, a California parolee, filed suit in the United States District Court for the Eastern District of California against the Governor of California, the California Department of Corrections and Rehabilitation (CDCR), various CDCR officials, and the California Board of Parole Hearings (formerly the Board of Prison Terms) and its officials. Valdivia alleged that California's parole-revocation procedures violated his rights under the Fourteenth Amendment's Due Process Clause as defined in *Morrissey* and *Gagnon*. The case was certified as a class action.

In June 2002, the district court granted partial summary judgment in favor of the plaintiff class, holding that California's parole-revocation system violated due process under *Morrissey*, *Gagnon*, and related authority. *Valdivia* v. *Davis*, 206 F. Supp. 2d 1068, 1078 (E.D. Cal. 2002). Following this determination,

the parties agreed to a stipulated permanent injunction, which the district court entered in March 2004. Paragraph 24 of the injunction provided that: "[t]he use of hearsay evidence shall be limited by the parolees' confrontation rights in the manner set forth under controlling law as currently stated in *United States* v. *Comito*, 177 F.3d 1166 (9th Cir. 1999)." Under *Comito*, to determine "whether the admission of hearsay evidence violates the releasee's right to confrontation in a particular case, the court must weigh the releasee's interest in his constitutionally guaranteed right to confrontation against the Government's good cause for denying it." *Id. Comito* points to two factors that are important when weighing an individual's right to confrontation: "the importance of the hearsay evidence to the court's ultimate finding and the nature of the facts to be proven by the hearsay evidence." *Id.* If a parolee can show that the hearsay at issue is significant in proving the violation and that it is not reliable, then the government is called upon to show good cause for not producing the witness. *Id.* at 1172.

The difficulty and expense of procuring witnesses (mere inconvenience or expense may be enough), and the traditional indicia of reliability borne by the evidence are factors in determining the government's good cause. *Id.*

3. Subsequently, the Ninth Circuit issued an opinion in *United States* v. *Hall*, 419 F.3d 980 (2005), stating that, "long-standing exceptions to the hearsay rule that meet the more demanding requirements for

criminal prosecutions should satisfy the lesser standard of due process accorded the respondent in a revocation proceeding." *Hall*, 419 F.3d at 987 (citing *Morrissey*, 408 U.S. at 489). In August 2007, the parties determined to seek clarification of the state of the law, and agreed under the provisions of a stipulation in the case to present the issue to the court-appointed special master. In October 2007, the plaintiff-class filed a motion with the special master, seeking to find the State Defendants in violation of Paragraph 24 of the injunction. Two issues concerning hearsay were identified: (1) whether hearsay-rule exceptions obviate the requirement to perform *Comito*'s good-cause balancing; and (2) whether, in determining the admissibility of hearsay evidence, *Comito* permits consideration of other hearsay evidence in the balancing process.

After briefing and a hearing, the special master in 2008, recommended that the State Defendants not be found in violation of the injunction. App., *infra*, 67a. The special master acknowledged that "[n]either the Supreme Court nor the Ninth Circuit has ruled directly on whether hearsay exceptions obviate the need for a balancing test in parole revocation hearings." App., *infra*, 46a. On the hearsay issues, however, the special master determined that: (1) hearsay exceptions do not eliminate having to engage in *Comito*'s good-cause balancing; and (2) other hearsay cannot be considered when determining whether a piece of hearsay may be admissible under *Comito* balancing, unless it too has satisfied *Comito*. App., *infra*, 60a & 65a. The special master also determined

that the "reliability of the hearsay is not a factor in determining whether the state had good cause not to produce a witness." App., *infra,* 70a.

Over the State Defendants' objections, the district court issued an order fully adopting the Report's conclusions and recommendations. App., *infra*, 77a-79a. The State Defendants appealed to the Ninth Circuit.

4. In a 2-1 published opinion, a Ninth Circuit panel affirmed the district court's order concerning hearsay procedures.[1] The panel majority (Hawkins, J., with M. Smith, J.) held that "[t]he law of this circuit is clear: the Comito test remains central to confrontation rights in parole hearings." App., *infra*, 8a. Thus, the panel majority determined that even when a hearsay statement falls within an enumerated hearsay exception so as to be admissible under the Confrontation Clause, California still must undertake *Comito*'s balancing test before relying on the statement in an administrative state parole-revocation hearing. Expressly acknowledging a contrary holding by the Second Circuit, the panel majority reiterated that "application of a balancing test to the admission of hearsay evidence in parole revocation hearings is not an open question in this circuit." App., *infra*, 11a

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[1] The Ninth Circuit Opinion was issued in two parts: Part I concerned the March 2008 order on the *Comito* issue that is the subject of this petition. Part II of the Opinion concerned issues unrelated to this petition (appeal no. 09-15836), and it was not the subject of the en-banc-review petition.

& n.4. The panel majority further held that the *Comito* rule extended even to hearsay evidence offered simply to meet the foundational requirement of *Comito*, i.e., merely to corroborate hearsay that was being offered. App., *infra*, 15a-19a.

The dissenting opinion (by Noonan, J.) rejected the majority's elevation of the rights of parolees in revocation proceedings above those of defendants in criminal proceedings. As the dissent explained, "By demanding that the state establish 'good cause' to rely on business records, excited utterances, and the like, the majority expands the confrontation rights of parolees beyond those held by criminal defendants." App., *infra*, 28a (Noonan, J., dissenting). The dissent further explained that principles of federalism preclude imposition of *Comito*'s balancing requirement "where no federal confrontation right is infringed," and where this Court has found that most traditional hearsay exceptions do not implicate the Sixth Amendment's Confrontation Clause. App., *infra*, 25a-27a (Noonan, J., dissenting). The dissent also rejected the majority's requirement that balancing be performed even for hearsay that is merely offered to corroborate the reliability of the proffered evidence. App., *infra*, 31a-32a (Noonan, J., dissenting). The dissent noted that trial judges are customarily free to consider inadmissible evidence offered only for the competence assessment of evidence proffered for admission, and that neither the Supreme Court nor the Ninth Circuit "has found this practice to contravene the minimum requirements of due process or to

require additional procedural safeguards." App., *infra*, 31a (Noonan, J., dissenting).

The Ninth Circuit denied the State Defendants' request for en banc review. But six judges dissented (Bea, J., with O'Scannlain, Tallman, Callahan, Ikuta, and N.R. Smith, JJ.). They observed that the "Ninth Circuit leaves in place a decision that affords greater due process protection as to evidence offered against parolees than as to evidence offered against criminal defendants." App., *infra*, 82a (Bea, J., dissenting). In particular, under the majority opinion, nontestimonial hearsay evidence that would be admissible in a criminal trial without any violation of the defendant's constitutional right would be inadmissible in a parole-revocation hearing unless the State shows "good cause" to admit the evidence under *Comito*. App., *infra*, 82a (Bea, J., dissenting). The dissent from en banc review also emphasized that the majority's decision squarely conflicted with the rule in the Second Circuit by rejecting the principle that "where the government proffers hearsay that would be admissible in a criminal proceeding under an established exception to the hearsay rule," no good-cause analysis is required. App., *infra*, 89a-90a (Bea, J., dissenting).

REASONS WHY THE PETITION SHOULD BE GRANTED

Introduction

By imposing stricter admissibility criteria on hearsay used in state parole-revocation hearings than the Confrontation Clause requires in criminal prosecutions, the Ninth Circuit's decision conflicts with *Morrissey* v. *Brewer*, 408 U.S. 471 (1972). *Morrissey* was clear that "the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations." *Id.* at 480. Further, *Morrissey* explained that the process afforded parolees should not equate to or supersede the process afforded criminal defendants in any sense. *Id.*

As this Court has further clarified, the Sixth Amendment's Confrontation Clause governs only "testimonial" statements in criminal cases. *Whorton* v. *Bockting*, 549 U.S. 406, 420 (2007); see *Crawford* v. *Washington*, 541 U.S. 36, 61 (2004). The Ninth Circuit's decision in this case, however, now requires States to undertake special "good-cause" balancing in administrative parole hearings before admitting not only testimonial hearsay governed by the Confrontation Clause in criminal cases, but even nontestimonial hearsay beyond the scope of the Confrontation Clause and falling within the scope of traditional hearsay exceptions sanctioned as reliable. App., *infra*, 11a-13a. The "confrontation" rights afforded to parolees under the Fourteenth Amendment cannot be

greater than the confrontation rights afforded criminal defendants under the Sixth Amendment.

Further, the Ninth Circuit's decision directly conflicts with the rule in the Second Circuit. The Second Circuit holds that no good-cause analysis is required in a parole-revocation proceeding where the government proffers hearsay that would be admissible in a criminal proceeding under an "established exception to the hearsay rule." *United States* v. *Williams*, 443 F.3d 35, 45 (2d Cir. 2006). The Ninth Circuit opinion in this case held to the contrary: that evidence falling under a hearsay-rule exception, despite its admissibility in criminal prosecutions, does not relieve the States of meeting the good-cause balancing test the Ninth Circuit established for parole revocations in *Comito*. Only the Ninth Circuit has held that highly reliable evidence, such as a statement that falls under a traditional hearsay-rule exception, may not be used by the State unless it passes muster under a special balancing test. *Curtis* v. *Chester*, No. 09-3338, 2010 U.S. App. LEXIS 24172, at *11 (10th Cir. Nov. 24, 2010) (citing *Valdivia*, 599 F.3d at 990).

The Ninth Circuit's decision threatens criminal cases too, for it provides the platform for criminal defendants to argue for extending *Comito* balancing to criminal trials – not as a right of confrontation, but as a due-process right. The Ninth Circuit thus has made "due process" a fertile ground upon which criminal defendants may seek confrontation rights

beyond those accorded to them under the Sixth Amendment.

A. The Ninth Circuit Opinion Conflicts with this Court's Decision in *Morrissey* By Providing Greater Confrontation Rights to Parolees than the Constitution Affords to Criminal Defendants.

In *Morrissey*, this Court made it clear that, although a parolee is entitled not to have his parole revoked without due process, "the full panoply of rights due a defendant in [a criminal prosecution] does not apply to parole revocations." 408 U.S. at 480, 482. A revocation proceeding is not to be equated to a criminal prosecution in any sense. *Id.* at 489. So certainly – as this Court also has made clear – the minimum due process protections required in parole-revocation hearings cannot exceed the due process afforded to defendants in criminal proceedings. *Id.* Indeed, given the parolee's status as a convicted defendant in constructive custody, his parole-revocation procedural rights must be less.

Yet, in its opinion here, the Ninth Circuit provided greater "due process" to parolees concerning the admissibility of hearsay than the Constitution affords to criminal defendants at trial. The decision below imposes special and peculiar admissibility criteria limiting the State's use of nontestimonial or traditionally reliable hearsay in administrative state parole-revocation hearings, beyond any requirements

imposed on the government for use of testimonial hearsay against defendants in criminal prosecutions. Under the Ninth Circuit opinion, nontestimonial hearsay evidence, even such evidence that would qualify for admissibility under traditional hearsay-rule exceptions, must nonetheless be scrutinized under the *Comito* criteria – whereas the admissibility of the same evidence in a criminal proceeding would be a "foregone conclusion." App., *infra*, 28a-29a (Noonan, J., dissenting).

The Ninth Circuit's failure to abide by this Court's clear directive in *Morrissey*, that a parolee's due-process confrontation right should not be greater than a criminal defendant's Sixth Amendment confrontation right, is manifest in the comparison of the use of nontestimonial hearsay. Under *Valdivia*, nontestimonial hearsay in parole-revocation hearings is treated no differently than testimonial hearsay – it is admissible only after a unique and problematic balancing analysis. App., *infra*, 11a-15a. That same nontestimonial hearsay in a criminal prosecution, however, is exempt from Confrontation Clause scrutiny entirely. *United States* v. *Sine*, 493 F.3d 1021, 1035 n.11 (9th Cir. 2007) (citing *Whorton*, 549 U.S. at 420).

The Ninth Circuit's decision affords greater rights to parolees in yet a further respect. It requires *Comito* balancing for evidence used solely to corroborate other hearsay evidence, whereas the same evidence in criminal trials would routinely be considered to evaluate whether the proffered evidence should be

admitted. App., *infra*, 31a (Noonan, J., dissenting). In contrast, the Federal Rules of Evidence permit courts in criminal cases to consider inadmissible evidence on preliminary questions concerning such matters as witness qualification, the existence of privilege, and indeed, even the admissibility of evidence. Fed. R. Evid. 104(a).

The Ninth Circuit fully acknowledged that its decision in *Comito* "could be construed as going beyond the minimal requirements espoused in *Morrissey*." App., *infra*, 17a. Nevertheless, the Ninth Circuit then went even further, by extending *Comito*'s balancing analysis to hearsay that does not raise confrontation concerns, such as nontestimonial hearsay and foundational evidence.

The Ninth Circuit illogically attempted to justify its overstepping by citing its concern that some protections in criminal trials are not applicable in parole-revocation cases. But its explanation is a non sequitur. It is not the Ninth Circuit's role to re-adjust perceived procedural disparities that this Court and the Constitution have put in place.

It is also noteworthy that the special master's Report recommended, and the district court ordered, that "reliability of the hearsay is not a factor in determining whether the state had good cause not to produce a witness." App., *infra*, 70a. This particular conclusion, although not discussed by the Ninth Circuit below, conflicts with the basic goal of due process: to ensure a minimum level of reliability for

decisions impacting liberty or property. As this Court explained in *Morrissey*, the Fourteenth Amendment purpose of protecting a parolee's interest in confronting adverse witnesses "is to ensure reliability of evidence." *Morrissey*, 408 U.S. at 484 ("to assure that the finding of a parole violation will be based on verified facts"); see also *United States* v. *Taveras*, 380 F.3d 532, 536 (1st Cir. 2004) ("An important element of the good cause analysis is the reliability of the evidence that the Government seeks to introduce."); *Barnes* v. *Johnson*, 184 F.3d 451, 454 (5th Cir. 1999) ("An important consideration in this balancing is the reliability of the challenged testimony."); *United States* v. *Martin*, 382 F.3d 840, 846 (8th Cir. 2004) ("In determining the government's good cause in not producing a witness, we look to 'both the difficulty and expense of procuring witnesses and the traditional indicia of reliability borne by the evidence.'").

The Ninth Circuit rule, however, violates the fundamental principle that reliability is the hallmark of due process. Instead, as the State Defendants advocated before the Ninth Circuit, basic reliability must be the lynchpin of any due-process right to challenge evidence in a parole-revocation proceeding. Thus, when out-of-court statements fall within a hearsay-rule exception, due-process reliability is obviously established because those exceptions have earned the imprimatur of legislatures and courts that over time, have recognized them as providing special trustworthiness with which due process is concerned.

That trustworthiness likely exceeds the minimum requirements of due process.

Evidence offering such reliability includes, at the least, conventional substitutes for live testimony such as affidavits, depositions, and documentary evidence – as identified by this Court in *Gagnon*, 411 U.S. at 782 n.5 – and statements falling under a traditionally established exception to the hearsay rule. See, *e.g.*, *Prellwitz* v. *Berg*, 578 F.2d 190, 193 (7th Cir. 1978) (holding evidence subject to business-records exception is reliable). They fulfill this Court's due-process mandate to ensure the reliability of evidence as set forth in *Morrissey*. The States should have the right to rely on reliable evidence in parole hearings – evidence such as statements falling within recognized exceptions to the hearsay rule – without regard to any further "good-cause" balancing analysis.

As recognized by Judge Noonan, the Ninth Circuit in this case, by requiring additional "good-cause" safeguards in parole-revocation hearings, "departs from Supreme Court precedent and exceeds [the Ninth Circuit's] limited authority to intervene in the criminal justice system of the fifty states." App., *infra*, 31a-32a (Noonan, J., dissenting). Similarly, as the Tenth Circuit has recognized, the Ninth Circuit in this case "counterintuitively grants parolees greater rights than the Constitution affords criminal defendants." *Curtis*, 2010 U.S. App. LEXIS 24172, at *11-12 n.3 (citing *Valdivia*, 623 F.3d 849). Simply put, the right to confront and cross-examine adverse witnesses cannot be given greater importance for a convicted

parolee who stands to be deprived only of conditional liberty, than for a presumptively innocent criminal defendant who stands to be deprived of absolute liberty. It is not within the Ninth Circuit's province to foist its view of confrontation in parole revocations on California, or any State within the circuit, in a way that exceeds the parameters of that right prescribed by this Court. The Ninth Circuit's opinion here did just that and thus contravenes *Morrissey*.

B. The Ninth Circuit Decision Has Created a Circuit Conflict on a Question of National Importance.

As the panel majority explicitly acknowledged, its decision to preclude the effect of hearsay-rule exceptions in parole-revocation hearings directly conflicts with the Second Circuit's holding that hearsay falling under a well-recognized exception need not be evaluated under a due-process balancing test because the evidence is sufficiently reliable. App., *infra*, 11a n.4 (citing *United States* v. *Williams*, 443 F.3d 35, 45 (2d Cir. 2006)); see also *United States* v. *Aspinall*, 389 F.3d 332, 344 (2d Cir. 2004). Further, in Judge Noonan's words, "The majority's headlong decision to create a circuit split is both unpersuasive and unnecessary." App., *infra*, 30a (Noonan, J., dissenting).

The Second Circuit squarely holds that, in a revocation hearing, "neither the Due Process Clause nor Rule 32.1 [of the Federal Rules of Criminal

Procedure] obliges the district court to perform a good-cause analysis with respect to a 'proffered out-of-court statement [that] is admissible under an established exception to the hearsay rule.'" *Williams*, 443 F.3d at 46 (citing *Aspinall*, 389 F.3d at 344); see also *United States* v. *Jones*, 299 F.3d 103, 114 (2d Cir. 2002) (holding that balancing analysis "is inapplicable where the out-of-court statement falls within an established exception to the hearsay rule"); see also *Gagnon*, 411 U.S. at 782 n.5 (emphasizing that in *Morrissey*, this Court did not intend to prohibit use of "conventional substitutes for live testimony").

Indeed, after *Comito*, the Ninth Circuit itself signaled support for an approach like that taken by the Second Circuit. In *Hall*, 419 F.3d 980, the Ninth Circuit suggested that hearsay subject to a traditional hearsay-rule exception need not be subjected to *Comito* balancing as a condition of admissibility – noting that "several pieces of evidence supporting the [parole-revocation charge] are admissible under hearsay exceptions." *Id.* at 987. *Hall* further proclaimed that "long-standing exceptions to the hearsay rule that meet the more demanding requirements for criminal prosecutions should satisfy the lesser standard of due process accorded the respondent in a revocation proceeding." *Id.* But the Ninth Circuit now has cast such reasoning aside. It emphatically pronounced *Comito* as the law for all of the states in the Ninth Circuit, applicable even to evidence historically admissible under traditional hearsay-rule exceptions,

and thus created a circuit conflict that this Court now should resolve. App., *infra*, 11a n.4.

A recent Tenth Circuit decision underscores the circuit conflict and the fact that *Valdivia* raises an issue of national importance. In *Curtis* v. *Chester*, the Tenth Circuit highlighted the Ninth Circuit's departure from Second Circuit precedent, and noted that "[o]nly the Ninth Circuit has expressly held highly reliable evidence (such as a hearsay exception) cannot be used in a revocation hearing unless it passes a balancing test." *Curtis*, 2010 U.S. App. LEXIS 24172, at *11 (citing *Valdivia*, 599 F.3d at 990).

Further, the Tenth Circuit pointed out in *Curtis* that it and four other circuits also apply a test different from *Comito*'s. Reflecting core due-process principles, those circuits allow for the admission of hearsay evidence without a showing of cause for the declarant's absence if the evidence is sufficiently reliable. *Id.* at *7-8. For example, the Third Circuit acknowledges that, while courts should normally use a balancing test, there are circumstances where "the releasee's interest in confrontation may be overwhelmed by the hearsay's reliability such that the Government need not show cause for a declarant's absence." *United States* v. *Lloyd*, 566 F.3d 341, 345 (3d Cir. 2009). And, although the Sixth Circuit typically employs a reliability test, see *United States* v. *Kirby*, 418 F.3d 621, 628 (6th Cir. 2005), it applied a balancing test in *United States* v. *Waters*, 158 F.3d 933, 940 (6th Cir. 1998).

Thus, the circuits have taken conflicting approaches, including: (1) a balancing test such as in *Comito*, where the releasee's right is balanced against the government's good cause in denying it; and (2) a reliability test that permits hearsay evidence to be admitted without a showing of cause for the declarant's absence based on sufficient indicia of reliability. This Court should resolve the conflict, in favor of allowing the States to use reliable hearsay in parole-revocation hearings.

C. The Ninth Circuit Opinion Threatens to Extend to Defendants in Criminal Cases, Confrontation Rights Under the Due Process Clause of the Fourteenth Amendment.

A defendant in a criminal prosecution has at stake a far greater liberty interest than does a convicted parolee, who is still in constructive custody and stands to have his parole revoked. The criminal defendant's constitutional protections, therefore, are far greater too. See *Morrissey*, 408 U.S. at 488-89. Thus, the Confrontation Clause erects a strict bar to un-confronted testimonial statements in criminal prosecutions. *Crawford*, 541 U.S. at 68. In contrast, in the parole-revocation context, due-process concerns do not prohibit "use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions and documentary evidence." *Gagnon*, 411 U.S. at 782 n.5.

But, as explained above, the Ninth Circuit decision in this case elevates the meaning of confrontation in parole revocations under the Fourteenth Amendment, to provide parolees with greater protection under the Due Process Clause than the Confrontation Clause provides to criminal defendants. Requiring state hearing officers to engage in *Comito* balancing for nontestimonial hearsay to be admitted in parole-revocation hearings, but permitting the admission of nontestimonial hearsay in criminal prosecutions under hearsay exceptions, achieves an incongruous result. As stated by the en banc dissent below, "if the Due Process Clause of the Fourteenth Amendment guarantees to parolees the right to have a hearing officer conduct the *Comito* balancing test before he admits nontestimonial evidence, surely a criminal defendant, who has an even greater liberty interest, has a due process right to have a trial judge conduct the *Comito* balancing test before he admits the same evidence." App., *infra*, 87a.

Thus, the Ninth Circuit has skewed the Constitution, interpreting it as if it afforded more confrontation protection to parolees than to criminal defendants. Criminal defendants now will seek to use the Ninth Circuit's decision as a springboard to demand *Comito*-type balancing for nontestimonial hearsay in criminal prosecutions, based not on the Sixth Amendment's Confrontation Clause, but on the Fourteenth Amendment's Due Process Clause.

D. This Case Presents a Proper Vehicle for Resolving the Important Question Presented in this Petition.

While it is true that the issue in this case initially arose from a dispute about the scope of the injunction, the Ninth Circuit's opinion operates beyond nuances of the injunction as a purported constitutional rule binding on California and other States within the circuit. The Ninth Circuit approached the issue as constitutional, not contractual, even noting that the State was ordered by the district court "to follow *Comito* and limit the use of hearsay evidence to the boundaries set by parolees' confrontation rights." App., *infra*, 10a.

Explaining that it was "bound" by *Comito* as the clear law of the circuit, the panel majority pronounced that "the *Comito* test remains central to confrontation rights in parole hearings." App., *infra*, 3a, 8a. The majority opinion affirmed that "*Comito* balancing continues to be the test in the Ninth Circuit, and that even if hearsay falls within a recognized exception, it is still subject to *Comito* balancing." App., *infra*, 10a. This holding, clearly, is not dependent on the injunction, but on the Ninth Circuit's construction of due process binding in all parole-revocation cases. The fact that the State Defendants entered into the original injunction, then, poses no impediment to review of the constitutional question by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: December 27, 2010

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JERRY VALDIVIA; ALFRED YANCY; HOSSIE WELCH, on their own behalf and on behalf of the class of all persons similarly situated, *Plaintiffs-Appellees,* v. ARNOLD SCHWARZENEGGER, Governor of the State of California, *Defendant-Appellant.*	Nos. 08-15889 and 09-15836 D.C. No. 2:94-CV-00671-LKK-GGH OPINION

Appeal from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, District Judge, Presiding

Argued and Submitted
January 11, 2010 – San Francisco, California

Filed March 25, 2010

Before: John T. Noonan, Michael Daly Hawkins and Milan D. Smith, Jr., Circuit Judges.

Opinion by Judge Hawkins;
Partial Concurrence and
Partial Dissent by Judge Noonan

COUNSEL

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OPINION

HAWKINS, Circuit Judge:

These consolidated appeals stem from the November 2003 Valdivia Permanent Injunction ("the Injunction") – based on a stipulation between Jerry Valdivia ("Valdivia") and a class of similarly situated

California parolees[1] ("Plaintiffs"), and Governor Arnold Schwarzenegger and the State of California (collectively "the State") – prescribing procedures for parole revocation hearings in California. Here, the State appeals two post-Injunction orders: (1) the March 25, 2008 order ("March 2008 order") adopting the Injunction-related recommendations of the court-appointed Special Master regarding the use of hearsay evidence in parole revocation hearings; and (2) the March 26, 2009 order ("March 2009 order") denying the State's motion to modify the Injunction to conform to the voter promulgated statute, Cal. Penal Code § 3044, formerly California Proposition 9 ("Proposition 9").

Bound by *United States v. Comito*, 177 F.3d 1166 (9th Cir. 1999), we affirm the March 2008 order. Because the March 2009 order made no express determination that any aspect of the California parole revocation procedures, as modified by Proposition 9, violated federal constitutional rights, nor any determination that the Injunction was necessary to remedy a constitutional violation, we vacate and remand the March 2009 order for the district court to

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[1] More specifically, the Plaintiff class consists of: "(1) California parolees at large; (2) California parolees in custody as alleged parole violators, and who are awaiting revocation of their state parole; and (3) California parolees who are in custody having been found in violation of parole and who have been thereupon sentenced to prison custody."

make that determination and to reconcile the Injunction and Proposition 9.

Background Facts & Procedural History

In May 1994, Plaintiffs challenged the constitutionality of parole revocation procedures under the Fourteenth Amendment's right to due process, as defined in *Morrissey v. Brewer*, 408 U.S. 471, 487-90 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973). The district court granted partial summary judgment in favor of Plaintiffs, holding that California's parole revocation hearing system violated their procedural due process rights. *Valdivia v. Davis*, 206 F. Supp. 2d 1068, 1078 (E.D. Cal. 2002). The parties later agreed to the Injunction, which limited "the use of hearsay evidence . . . by parolees' confrontation rights in the manner set forth in . . . *Comito*."

The March 2008 order

In response to the parties' attempts to clarify the Injunction in light of *United States v. Hall*, 419 F.3d 980 (9th Cir. 2005), and after additional briefing and a hearing, the Special Master recommended: (1) the State should be found in violation of the Injunction; (2) all hearsay is subject to *Comito* balancing – weighing "the releasee's interest in his constitutionally guaranteed right to confrontation against the Government's good cause for denying it," *Comito*, 177 F.3d at 1170; (3) hearsay exceptions do not eliminate having to engage in full *Comito* balancing; and (4) the

State did not demonstrate compliance with paragraph 24 of the Injunction.[2] In its March 2008 order, the district court fully adopted the Special Master's conclusions and recommendations. The State subsequently filed this timely appeal.

The March 2009 order

Following passage of Proposition 9, Plaintiffs moved the district court to enforce the Injunction and bar implementation of Proposition 9 due to its conflict with the Injunction. The State countered with a motion to modify the Injunction to conform to Proposition 9.

After oral argument, the district court issued its March 2009 order, granting, in part, Plaintiffs' motion to enforce the Injunction, and denying the State's motion to modify it. The district court found that while several provisions of Proposition 9 conflict with the Injunction, application of the Supremacy Clause meant the Injunction prevails over state law, to the extent of any conflict. Modification was also not warranted, according to the district court, because Proposition 9 did not constitute a change in applicable law or facts. The court did not reach whether

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[2] Paragraph 24 of the Injunction states: "The use of hearsay evidence shall be limited by the parolees' confrontation rights in the manner set forth under controlling law as currently stated in *United States v. Comito*, 177 F.3d 1166 (9th Cir. 1999). The Policies and Procedures shall include guidelines and standards derived from such law."

Proposition 9 violates the U.S. Constitution. The State then filed this timely appeal of the March 2009 order, and the two appeals were consolidated.

JURISDICTION

We have jurisdiction over the appeal of both orders pursuant to 28 U.S.C. § 1292(a)(1).

Because the March 2008 order modifies an existing injunction, it is immediately appealable under 28 U.S.C. § 1292(a)(1). *See Gon v. First State Ins. Co.*, 871 F.2d 863, 865-66 (9th Cir. 1989). It also fulfills the three-part test of *Thompson v. Enomoto*, 815 F.2d 1323, 1326-27 (9th Cir. 1987). First, it "ha[d] the practical effect of the grant or denial of an injunction": it added the recommendations of the Special Master to the Injunction and mandated them, including the qualitative assessment and training of Deputy Commissioners and the Special Master's new role as a moderator and supervisor. *See id.* Second, it had "serious, perhaps irreparable consequences," *id.*, such as the possible contravention of Supreme Court precedent by imposing "numerous . . . costly obligations" on the State, including additional required training and monitoring programs. *Cf. Negrete v. Allianz Life Ins. Co. of N. Am.*, 523 F.3d 1091, 1097 (9th Cir. 2008) (finding serious consequences where "none of the other cases in which Allianz is, or may be, involved can be settled by or in the other courts in which they are located absent permission of Negrete Counsel and the court in this case"). Finally, it "can

only be challenged by immediate appeal because if [the State] awaits the final determination of this case" the damage to hearsay determinations in parole hearings, and the cost of monitoring the Deputy Commissioners, will have already accrued. *See id.* It is unclear how long this litigation, which began over 15 years ago, will continue before a final judgment issues. "A decision by us months or years after that cannot repair the damage." *Id.*

The March 2009 order is appealable, as both parties concede, under 28 U.S.C. § 1292(a)(1), as the State is appealing an order refusing to modify an injunction.

STANDARD OF REVIEW

The district court's March 2008 order adopted the Special Master's report and recommendations in its entirety. The legal conclusions of a Special Master are reviewed de novo. *See United States v. Clifford Matley Family Trust,* 354 F.3d 1154, 1163 n.10 (9th Cir. 2004). Factual findings of a Special Master are entitled to deference and reviewed for clear error. *See Labor/Cmty. Strategy Ctr. v. Los Angeles County Metro. Transit Auth.,* 263 F.3d 1041, 1049 (9th Cir. 2001).

"[M]atters of discretion," such as evidentiary rulings and interpretations of the Federal Rules of Civil Procedure, are reviewed for abuse of discretion. *Harman v. Apfel,* 211 F.3d 1172, 1175 (9th Cir. 2000). Under this standard, a reviewing court cannot

reverse absent a definite and firm conviction that the district court committed a clear error of judgment in the conclusion it reached upon a weighing of relevant factors. *SEC v. Coldicutt*, 258 F.3d 939, 941 (9th Cir. 2001). Motions for relief from judgment under Fed. R. Civ. P. 60(b), such as the one present in the appeal of the March 2009 order, are reviewed for abuse of discretion. *See United States v. Asarco Inc.*, 430 F.3d 972, 978 (9th Cir. 2005).

ANALYSIS

I. The March 2008 Order

The State argues the district court erred in applying the *Comito* test to parole revocation hearings via the March 2008 order. It contends any hearsay evidence falling under a traditional or long-standing exception ought not to be subject to the *Comito* balancing test, based on this court's holding in *Hall*, 419 F.3d 980. This argument, however, fails. The law of this circuit is clear: the *Comito* test remains central to confrontation rights in parole hearings. The district court did not err in subjecting the State's parole revocation hearings to these requirements.

A. Nature of the confrontation rights of parolees

We begin by noting that parole revocation hearings are "not part of a criminal prosecution and thus the full panoply of rights due a [criminal] defendant"

are not due a parolee. *Morrissey,* 408 U.S. at 480. Nonetheless, parolees are due certain "minimum requirements of due process," including the right to confront witnesses. *Id.* at 488-89. These rights, however, are based in the Due Process Clause of the Fourteenth and Fifth Amendments and not in the Confrontation Clause of the Sixth Amendment and its articulation in the *Crawford* line of cases.[3] *Hall,* 419 F.3d at 985-86 ("We, like the two circuits that have also addressed this question, see no basis in *Crawford* or elsewhere to extend the *Sixth Amendment* right of confrontation to supervised release proceedings.") (referencing *Crawford v. Washington,* 541 U.S. 36 (2004)).

In *Comito,* this court specified the test for the confrontation rights of parolees. "[I]n determining whether the admission of hearsay evidence violates the releasee's right to confrontation in a particular case, the court must weigh the releasee's interest in his constitutionally guaranteed right to confrontation

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[3] Our dissenting colleague takes issue with our use of *Comito* balancing "where no federal confrontation right is infringed," and where the Supreme Court has found that most hearsay exceptions do not implicate the Confrontation Clause of the Sixth Amendment. Dissenting Op. at 4839-40. But we are not faced here with applications of the Sixth Amendment Confrontation Clause to parole revocation hearings, rather, the right to confrontation as espoused by Fourteenth Amendment due process, and its articulation in *Morrissey* by the Supreme Court, and in *Hall* and *Comito* in our circuit. There is therefore a federal confrontation right at issue here, one that is rooted in due process rather than the Sixth Amendment.

against the Government's good cause for denying it." 177 F.3d at 1170. The weight given to a parolee's right to confrontation is assessed by two non-exhaustive factors: "the importance of the hearsay evidence to the court's ultimate finding and the nature of the facts to be proven by the evidence." *Id.* at 1171. If the hearsay evidence is not important to the finding of a violation, the error in admitting the hearsay evidence can be considered harmless, but is still subject to the good cause analysis. *Id.* at 1171-72.

Here, in the Injunction, the district court ordered the State to follow *Comito* and limit the use of hearsay evidence to the boundaries set by parolees' confrontation rights. The Special Master, and in turn the district court, did not err in the determination that *Comito* balancing continues to be the test in the Ninth Circuit, and that even if hearsay falls within a recognized exception, it is still subject to *Comito* balancing.

B. *United States v. Hall*

In *Hall,* the parolee was faced with hearsay evidence from a non-available declarant. *After* "[b]alancing the *Comito* factors," the court found that the parolee had "little interest in confrontation . . . because [the declarant's out-of-court statements] w[ere] insignificant to the ultimate finding[,]" and were "outweighed by the government's substantial showing of good cause" for failing to produce the declarant at the hearing. *Hall,* 419 F.3d at 989. While the hearsay

exception evidence lessened "the importance of [the declarant's out-of-court statements] to the court's ultimate finding," and rendered harmless any error in admitting those out of court statements, *id.* at 986 & n.5, the failure to produce the declarant remained subject to analysis of the Government's good cause explanation, and to full *Comito* balancing.

The application of a balancing test to the admission of hearsay evidence in parole revocation hearings is not an open question in this circuit.[4] *See Hall,* 419 F.3d at 986; *Comito,* 177 F.3d at 1170-73; *United States v. Walker,* 117 F.3d 417, 420-21 (9th Cir. 1997); *United States v. Simmons,* 812 F.2d 561, 564 (9th Cir. 1987). *Hall* did not overrule or modify the *Comito* balancing test.

C. Hearsay exceptions and *Comito* balancing

Because the Federal Rules of Evidence do not apply to parole revocation hearings, *see Walker,* 117 F.3d at 420, evidence falling within enumerated hearsay exceptions is subject to *Comito* balancing. While, in general, hearsay exception evidence is admissible

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[4] We are aware of the Second Circuit's contrary holding. *See United States v. Williams,* 443 F.3d 35, 45 (2d Cir. 2006). However, as a three-judge panel, and with no intervening Supreme Court or Ninth Circuit precedent, we are bound by this court's holding in *Comito.*

at trial because of assurances of reliability,[5] reliability or "trustworthiness" is included in the *Comito* "right to confrontation" analysis: less reliable hearsay can contribute to more weight placed on a parolee's right to confrontation over the government's good cause. *Comito,* 177 F.3d at 1171-72 ("Because the hearsay evidence was important to the court's finding, and because it involved the least reliable form of hearsay, Comito's interest in asserting his right to confrontation is at its apogee."). Reliability does not result in automatic admissibility: "Simply because hearsay evidence bears some indicia of reliability does not render it admissible." *Hall,* 419 F.3d at 988. Therefore, evidence falling under a hearsay exception does not circumvent the *Comito* balancing test. It remains a part of it as an "indicia of reliability," and subject to good cause analysis.

D. Due process rights of parolees

The *Comito* test does not elevate the due process rights of parolees to those of criminal defendants. Criminal defendants have trial rights, including a jury trial, proof beyond a reasonable doubt, application of the applicable rules of evidence, and Sixth

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[5] *See* Fed. R. Evid. 803, Advisory Committee Notes ("The present rule proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available.").

Amendment confrontation rights. Even testimonial hearsay that falls under a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness" may not be admitted against a defendant without confrontation or cross-examination. *Crawford*, 541 U.S. at 60-68. These protections stand in firm contrast to the conditional due process rights of parolees, which can be justifiably denied – and hearsay admitted – if the Government's good cause is sufficient under *Comito*.

The dissent is concerned that the admission of hearsay exception evidence against a criminal defendant "is a foregone conclusion" while such evidence would be admissible in a parole revocation hearing once it is subject to a showing of "good cause." Dissenting Op., at 4841. Hearsay evidence that is testimonial in nature, however, regardless of any exceptions, is inadmissible against a criminal defendant under *Crawford*. However, *both* testimonial and non-testimonial hearsay are admissible against a parolee, provided the hearsay fulfills *Comito* balancing. Moreover, the admission of hearsay evidence falling within an exception against a criminal defendant is not a foregone conclusion; all hearsay evidence is subject to Fed. R. Evid. 403 balancing (whether the evidence is more prejudicial than probative). The Federal Rules of Evidence, and such prejudicial/probative weighing, do not govern parole revocation hearings, *see United States v. Walker*, 117 F.3d 417, 421 (9th Cir. 1997), and therefore do not protect parolees as they do criminal defendants.

Raising an argument neither party raised in this appeal, the dissent also contends we have failed to define hearsay. *See* Dissenting Op., at 4840-41. California parole revocation proceedings, however, are governed by state law whose hearsay definitions would apply. Contrary to the dissent's characterization, we are not "mandating" applicable hearsay law, or attempting to redefine it, *see* Dissenting Op., at 997, but merely ensuring that state procedures comport with federal due process per the law of this circuit.

The district court, therefore, did not err in subjecting the State's parole revocation hearings to the *Comito* balancing requirements.[6] *Comito* balancing

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[6] The dissent finds that our upholding the application of *Comito* balancing to these state parole hearings is a violation of principles of federalism, as no Ninth Circuit cases have previously applied such a procedure to state procedures, but rather only to federal supervised release or probation. *See* Dissenting Op. at 4840. However, the Supreme Court's ruling in *Morrissey*, and this court in *Comito*, imposed "certain minimum due process requirements" for parole revocation, revocation of probation, and revocation of supervised release, necessary to protect a parolee's constitutional right to confrontation. *Comito*, 177 F.3d at 1170, 1172. The district court, in its June 2002 partial grant of summary judgment in favor of Plaintiffs, found that California's parole revocation hearing system violated Plaintiffs' procedural due process rights. *Valdivia*, 206 F. Supp. 2d at 1078. This order was not appealed. There is therefore a demonstrated constitutional violation present in the California parole revocation hearing system, and principles of federalism do not permit a state to violate what this court has already deemed to be a constitutionally-protected right.

remains the framework for confrontation rights in parole revocation hearings, and does not elevate the due process rights of parolees over those of criminal defendants.

E. Corroborating hearsay with hearsay

The Special Master recommended, and the district court adopted the ruling, that "[h]earsay *cannot* be used to corroborate proffered hearsay unless it, too, survives a *Comito* balancing test." The district court did not err in this determination.

Neither *Comito* nor *Hall* offer a clear rule on whether other hearsay evidence can be used to corroborate or support the reliability of proffered hearsay in a parole revocation hearing without being subject to a balancing test. The court in *Comito* specifically declined to consider the admissibility of the underlying hearsay. 177 F.3d at 1169 ("While the additional evidence may also be subject in whole or in part to valid objections based on hearsay and Comito's right to confrontation, those challenges are not raised before us."). While the court in *Hall* did not subject the underlying hearsay to any sort of balancing test, it did not articulate a particular rule as to whether or when a balancing test should be employed. *See* 419 F.3d at 987.

We affirm, therefore, not because *Hall* and *Comito* hold that "on balance . . . these courts expect corroboration to come from competent evidence," but

because of the Supreme Court's description in *Morrissey* of the due process rights of parolees.

The basic question we face here is whether the government should be required to provide good cause for the absence of the declarant in the underlying hearsay statement that it seeks to use as an indicia of reliability. To satisfy due process, *Morrissey* requires the State to demonstrate good cause. The Court in *Morrissey* considered the rights described in its opinion to be a floor – the basic, minimal rights afforded to parolees by due process. *Morrissey,* 408 U.S. at 488-89 ("Our task is limited to deciding the minimum requirements of due process."). Among these rights is "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)." *Id.* at 489. The good cause balancing of *Comito* for all hearsay fits comfortably with *Morrissey*'s basic minimum due process guarantees for parolees. Admitting hearsay without the good cause analysis does not.

The dissent's concern that we have exceeded *Morrissey*'s "minimum requirements," 408 U.S. at 488-89, *see* Dissenting Op. at 4843, is a concern not with our opinion, but with *Comito* itself, which states:

> Under *Morrissey,* every releasee is guaranteed the right to confront and cross-examine adverse witnesses at a revocation hearing, unless the government shows good cause or not producing the witness. This right to confrontation ensures that a finding of a

> supervised release violation will be based on verified facts. Accordingly, in determining whether the admission of hearsay evidence violates the releasee's right to confrontation in a particular case, the court must weigh the releasee's interest in his constitutionally guaranteed right to confrontation against the Government's good cause for denying it.

177 F.3d at 1170 (internal citations omitted). While *Comito* could be construed as going beyond the minimal requirements espoused in *Morrissey*, we are not bound to adhere only to minimal requirements; *Comito* is not inconsistent with those requirements, and no intervening precedent has arisen since *Comito*, either in our circuit or in the Supreme Court, to suggest otherwise.[7]

In addition, allowing hearsay that does not pass *Comito* balancing to be considered in the determination of a statement's reliability seems contrary to this Circuit's holding in *Hall*. *Hall* did say that "long-standing exceptions to the hearsay rule that meet more demanding requirements for criminal prosecutions *should* satisfy the lesser standard of due process accorded the respondent in a revocation hearing." *Hall*, 419 F.3d at 987 (emphasis added). *Should*

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[7] The dissent suggests our excerpting of *Comito* here to be "inapposite" because "the hearsay at issue was *actually admitted against* the parolee as evidence." *See* Dissenting Op. at 7 (emphasis in original). However, in both *Hall* and *Comito*, the hearsay was admitted *after* application of the *Comito* balancing test. 177 F.3d at 1173; *Hall*, 419 F.3d at 986-87, 989.

satisfy, however, does not mean "do satisfy." The court in *Hall,* after making this statement, went on to subject Hall's medical records, which fell under the business records exception to the hearsay rule (Fed. R. Evid. 803(6)), to *Comito* balancing, weighing "Hall's interest in excluding hearsay evidence . . . against the government's good cause for not producing [the witness]." *Id.* Thus, following this circuit's example in *Hall,* and the reasoning of *Morrissey* and *Comito,* we believe that hearsay used to corroborate other hearsay remains subject to *Comito* balancing. The process nonetheless remains "flexible enough to consider evidence . . . that would not be admissible in an adversary criminal trial." *Id.* (citing *Morrissey,* 408 U.S. at 489).

The State argues that subjecting all hearsay to this balancing test is too arduous a burden, eliminating the "flexibility" *Morrissey, id.,* seems to embrace. *Comito* itself, however, allows for the admission of testimonial evidence not normally admissible in criminal trials. While *Crawford* restricts the use of certain unauthenticated evidence, *Crawford,* 541 U.S. at 61, in a parole revocation hearing, under the *Comito* balancing test, testimonial hearsay evidence *is admissible* against a parolee without the testimony of a declarant, provided the government demonstrates the requisite good cause for its inability to produce the declarant.

Therefore, subjecting underlying hearsay to the *Comito* balancing test conforms with *Morrissey* and our precedent, and the district court did not err in

adopting this recommendation of the Special Master on this record.

F. *Morrissey* and Other Obligations Imposed on the State

Other obligations imposed on the State by the March 2008 order, including professional training for Deputy Commissioners, do not contravene the Supreme Court's determination that a hearing body need not necessarily be composed of judicial officers or lawyers. *Morrissey*, 408 U.S. at 486. Nor does the imposed disciplinary system contravene *Morrissey*'s directive that hearing officers remain "neutral and detached." *Id.* at 489.

The March 2008 order not only encourages the neutral, detached behavior envisioned by *Morrissey*, but also increases the experience and training of the officers. Nor does it mandate an entire body filled with judicial officers or lawyers, which was the Court's fear in *Morrissey*. *Id.* at 486 ("The independent officer *need not* be a judicial officer.") (emphasis added).

While the State was not found to have violated the Injunction, the Special Master found that the State had not fully complied with its requirements. Where the state has not "fully complied with the court's earlier orders," the district court has "ample authority to go beyond earlier orders." *Hutto v. Finney*, 437 U.S. 678, 687 (1978); *see also Toussaint v. McCarthy*, 801 F.2d 1080, 1087 (9th Cir. 1986) ("a

federal court must order effective relief" and a "defendant's history of noncompliance with prior orders is a relevant factor in determining the necessary scope of an effective remedy"). Here, in implementing a disciplinary system, the district court was merely attempting to ensure compliance with the Injunction and was therefore not limited by its earlier orders. The obligations imposed by the district court here, therefore, do not constitute error in contravention of court precedent.

G. Dismissal of the State's Objections

The district court did not err in dismissing the State's objections to the evidence presented in the Special Master's report. While the State has argued several potential evidentiary errors in its briefs, we address here only those for which the State has provided support as opposed to mere conjecture.

Evidentiary rulings are reviewed for abuse of discretion, and should not be reversed unless, more probably than not, the error tainted the outcome. *Harman*, 211 F.3d at 1175; *Gribben v. United Parcel Serv., Inc.*, 528 F.3d 1166, 1172 (9th Cir. 2008); Fed. R. Evid. 103(a). In addition, we may affirm the district court's decision to admit evidence on any basis in the record, so long as the issue has been briefed. *United States v. Vizcarra-Martinez*, 66 F.3d 1006, 1011 (9th Cir. 1995) ("court of appeals may affirm a decision to admit evidence on a different ground than that relied upon by the district court as long as the

issue has been fully briefed on appeal, and there is sufficient basis in the record for us to address it" (internal quotation marks omitted)). The Special Master did not improperly use judicial notice, nor rely on inadmissible hearsay to support his findings.

The Special Master did not use judicial notice to bypass the process of authenticating documents on which he relied. Transcripts were submitted as evidence, but the original tapes remained in the State's custody. For the State to challenge the authenticity of transcripts to which they have the original tapes defeats the purpose of the evidentiary rule. Plaintiffs attempted to obtain the tapes from the State; when they were declined, they resorted to transcripts.[8] Plaintiffs were not required to submit the originals for authentication in court, and the State never challenged their authenticity in court, rendering judicial notice possible.[9]

Judicial notice is used to supplant authentication of "adjudicative facts" – "simply the facts of the

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[8] Under Fed. R. Evid. R. 1004(3), the party is not required to present the original in court (here, the recording), "[a]t a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing[.]"

[9] *See* Fed. R. Evid. 201 ("A judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.").

particular case." Fed. R. Evid. 201, Advisory Committee Notes. Stated another way, "the adjudicative facts are those to which the law is applied in the process of adjudication. They are the facts that normally go to the jury. They relate to the parties, their activities, their properties, their businesses." *Id.* (citations omitted). The authenticity of these transcripts was not challenged by either party. Thus judicial notice was proper, and the Special Master correctly admitted and relied upon the transcripts.

Additionally, the Special Master's findings were based not on inadmissible hearsay, but rather on observations by employees and observers, statements based in personal knowledge that were not out-of-court statements. For these reasons, we affirm the district court's March 2008 order adopting the Special Master's report and recommendations.

II. The March 2009 Order

The district court, in its March 2009 order, denied modification of the Injunction to conform with California's Proposition 9. While the court correctly found the State had not met its burden to show a significant change in circumstances normally necessary for modification under *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992), such a showing may not have been necessary in light of federalism principles. The district court made no express determination that the Injunction's procedures were necessary to remedy federal constitutional violations, and

did not expressly find any aspect of the California parole revocation procedures, as modified by Proposition 9, in violation of basic constitutional rights.

A district court may refuse to modify a federal injunction in light of a given state law where such a law violates federal law. *See Clark v. Coye,* 60 F.3d 600, 605 (9th Cir. 1995). However, merely finding that a state law conflicts with a federal injunction, such as the court found here, is insufficient to deny modification of the injunction, and "clearly constitute[s] an abuse of discretion." *Id.* ("In the case before us, Bill 35 was held to be inconsistent with the terms of the injunction, not with the federal law upon which the injunction was based. The district court has never concluded that Bill 35 violates federal law. It is irrelevant whether Bill 35 frustrates the broad purpose of the district court's injunction.").

Further, while the Injunction was put in place to remedy claimed constitutional violations, it is not clear that these procedures were *required* to remedy the violation of basic constitutional rights. The district court made this clear in the hearing prior to issuing the March 2009 order:

> [I]n this case I never found any of the things that now everybody is concerned about, whether they were consistent with the Constitution of the United States or not. . . . What I found was that the parties had agreed to get rid of this lawsuit. *There clearly were some procedures which were violative of the Federal Constitution,* and they said,

> "Look, we're going to solve this whole problem, and we, the plaintiffs, will give away some of our constitutional rights in order to gain these other rights.". . . . *It isn't really true* that this Court made a determination that these specific procedures *were required* by the Federal Constitution. The Court said, "You guys are happy, I'm happy."

While these procedures were put in place in an attempt to remedy a claimed constitutional violation, they were not *necessary or required* by the Constitution. There is no indication anywhere in the record that these particular procedures are necessary for the assurance of the due process rights of parolees.

This circuit's law is clear: unless a state law is found to violate a federal law, or unless the Injunction is found necessary to remedy a constitutional violation, federalism principles require the reconciliation of the state law and federal injunctions. *See Keith v. Volpe,* 118 F.3d 1386, 1393-94 (9th Cir. 1997) (finding state law prevailed, and vacating injunction, where no determination made by district court that the injunction was necessary to remedy a constitutional violation); *Clark,* 60 F.3d at 604 ("[T]he scope of federal injunctive relief against an agency of state government must always be narrowly tailored to enforce federal constitutional and statutory law only."). Therefore, we vacate and remand the March 2009 order for the court to reconcile Proposition 9 with the Injunction.

CONCLUSION

We affirm the district court's March 2008 order, as we are bound by *Comito*. Because the district court made no express determination that any aspect of the California parole revocation procedures, as modified by Proposition 9, violated constitutional rights, or that the Injunction was necessary to remedy a constitutional violation, we vacate and remand the March 2009 order for the district court to make that determination and reconcile the Injunction with California law as expressed in Proposition 9.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Each party to bear its own costs on appeal.

NOONAN, Circuit Judge, concurring and dissenting:

I concur in Part II of the majority's opinion. A federal court cannot disregard or encroach on state prerogatives unless it must do so to vindicate federal law or the Constitution. For this same reason, however, I dissent from the majority's analysis in Part I. Hearsay evidence that falls within a firmly rooted hearsay exception does not offend any federal right held by parolees, and we therefore have no authority to impose "*Comito* balancing" when such evidence is proffered in parole revocation hearings conducted by a state. The majority's contrary holding places the Ninth Circuit in conflict with the only other circuit to squarely consider this issue. *See United States v.*

Williams, 443 F.3d 35, 45 (2d Cir. 2006). I also dissent because I see no basis to require additional "*Comito* balancing" where the hearsay in question serves only to corroborate the reliability of proffered hearsay evidence and is not actually admitted against the parolee.

I.

In hearings on the revocation of parole, *Morrissey* instructs that the "minimum requirements of due process" include "the right to confront and cross-examine adverse witnesses." 408 U.S. at 488-89. This right to confrontation is applied through the Due Process Clause of the Fourteenth Amendment. It provides no greater guarantee than that afforded to criminal defendants under the Sixth Amendment. *See, e.g., Gagnon v. Scarpelli*, 411 U.S. 778, 782 n.5 (1973); *Morrissey*, 408 U.S. at 489; *United States v. Simmons*, 812 F.2d 561, 564 (9th Cir. 1987). The Sixth Amendment, in turn, does not enact the hearsay rule, nor is it offended by evidence that falls within a firmly rooted hearsay exception. As the Supreme Court explained:

> We have allowed the admission of statements falling within a firmly rooted hearsay exception since the Court's recognition in *Mattox v. United States*, 156 U.S. 237 (1895), that the Framers of the Sixth Amendment "obviously intended to . . . respec[t]" certain unquestionable rules of evidence in drafting the Confrontation Clause. Justice Brown,

> writing for the Court in that case, did not question the wisdom of excluding deposition testimony, *ex parte* affidavits and their equivalents. But he reasoned that an unduly strict and "technical" reading of the Clause would have the effect of excluding other hearsay evidence, such as dying declarations, whose admissibility neither the Framers nor anyone else 100 years later "would have [had] the hardihood . . . to question."

Lilly v. Virginia, 527 U.S. 116, 125-26 (1999) (citations omitted) (alterations and ellipses in original); *see Melendez-Diaz v. Massachusetts,* 129 S. Ct. 2527, 2539 (2009) (observing that most hearsay exceptions do not implicate a criminal defendant's right to confrontation because they "cover[ ] statements that by their nature [are] not testimonial – for example, business records or statements in furtherance of a conspiracy" (quoting *Crawford v. Washington,* 541 U.S. 36, 56 (2004))).

By requiring "*Comito* balancing" where no federal confrontation right is infringed, the majority recedes from the principles of federalism espoused in Part II of its opinion. It imposes on the state a procedure crafted by the Ninth Circuit that has heretofore applied only to the revocation of federal supervised release or probation, not the revocation of state parole. *See Hall,* 419 F.3d at 982; *Comito,* 177 F.3d at 1167; *United States v. Walker,* 117 F.3d 417, 418-19 (9th Cir. 1997); *United States v. Martin,* 984 F.2d 308, 309 (9th Cir. 1993); *Simmons,* 812 F.2d at 562-63.

The majority requires this procedure whenever the state relies on "hearsay" evidence, yet its opinion does not purport to define this now critical term. In the federal system, the term "hearsay" expressly excludes, *inter alia,* statements by coconspirators or admissions by a party to the proceeding. *See* Fed. R. Evid. 801(d)(1), (2); *Hall,* 419 F.3d at 986. But under California law, these same statements *are* termed "hearsay" and are admissible only under "hearsay exceptions." *See* Cal. Evid. Code §§ 1200-01, 1220, 1223. Which definition of "hearsay" does the majority mandate in California's parole proceedings? I presume we will be called upon to answer this question – and others like it – in due course. *Contra Morrissey,* 408 U.S. at 488 ("We cannot write a code of procedure; that is the responsibility of each State.").[1]

By demanding that the state establish "good cause" to rely on business records, excited utterances, and the like, the majority expands the confrontation rights of parolees beyond those held by criminal defendants. *Contra id.* at 489; *Simmons,* 812 F.2d at 564. The majority attempts to justify this expansion by noting that – unlike in criminal trials – the state can always trump parolees' confrontation rights, even

[1] In my view, the type of "hearsay" evidence that raises federal due process concerns is straightforward. Because the Fourteenth Amendment confers no greater confrontation right than that afforded to criminal defendants, the state must show "good cause" only where it relies on evidence that would violate the Confrontation Clause in a criminal proceeding.

if no firmly rooted hearsay exception applies. *See* Maj. Op. 4829. But it is quite likely that most hearsay evidence offered in parole hearings will fall under some firmly rooted hearsay exception. *See generally, e.g., United States v. Wake,* 948 F.2d 1422, 1435 (5th Cir. 1991) ("[T]here are, needless to say, numerous exceptions to hearsay not being admissible."). As a matter of constitutional law, the majority equips parolees to exclude such evidence if the state cannot demonstrate "good cause," yet the admissibility of this same evidence against criminal defendants is a foregone conclusion.[2]

The majority braces its holding by noting that parolees will still lack many of the other rights enjoyed by criminal defendants, such as the right to a jury and proof beyond a reasonable doubt. *See* Maj. Op. 4920. But this rationale is foreign to our jurisprudence. We cannot retool discrete constitutional guarantees so long as the total quantum of "due process" afforded to parolees will not exceed that of criminal defendants. Like parolees, juveniles in delinquency proceedings have no right to a jury trial, *see McKeiver v. Pennsylvania,* 403 U.S. 528, 545 (1971), yet we are not empowered to enhance juveniles'

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[2] The majority posits that certain rules of evidence, such as Rule 403 of the Federal Rules of Evidence and its state analogues, may help to alleviate this disparity. *See* Maj. Op. 4829. I decline to rely on legislative enactments and the discretion of trial judges to offset the asymmetry that the majority injects into the Constitution.

confrontation rights, raise the burden of proof, or demand greater effectiveness from their appointed attorneys.

The majority asserts that its decision is compelled by the "law of this circuit," rejecting the Second Circuit's contrary views in a footnote. Maj. Op. 4826; *id.* at 4828 n.4. Yet our prior caselaw involved federal probationers challenging evidence that would be inadmissable [sic] against criminal defendants. These precedents do not dictate our decision in a case involving state parolees disputing evidence "whose admissibility neither the Framers nor anyone else 100 years later 'would have [had] the hardihood . . . to question.'" *Lilly*, 527 U.S. at 126 (alteration and ellipses in original).

Furthermore, our most recent decision in *Hall* strongly supports the approach taken by the Second Circuit. *Compare United States v. Aspinall*, 389 F.3d 332, 344 (2d Cir. 2004) ("[T]he [due-process] balancing analysis need not be made where the proffered out-of-court statement is admissible under an established exception to the hearsay rule."), *with Hall*, 419 F.3d at 987 ("[L]ong-standing exceptions to the hearsay rule . . . should satisfy the lesser standard of due process accorded the respondent in a revocation proceeding."). Indeed, the *Hall* court favorably cited the same line of Second Circuit precedents that the majority today rejects out of hand. *See Hall*, 419 F.3d at 986 (citing *Aspinall*, 389 F.3d at 342). The majority's headlong decision to create a circuit split is both unpersuasive and unnecessary.

II.

To apply its prescribed "balancing test," the *Comito* court instructed decisionmakers to consider "the accuracy and reliability of the proffered [hearsay] evidence," and advised that the greater the reliability of the proffered evidence, the lesser a respondent's interest "in testing it by exercising his right to confrontation." *See* 177 F.3d at 1171. Today, the majority holds that when hearsay is considered solely to evaluate the reliability of proffered hearsay evidence, it too must be independently subjected to "*Comito* balancing." To support its holding, the majority excerpts at length from our decisions in *Comito* and *Hall*, yet in each instance the hearsay at issue was *actually admitted against* the parolee as evidence; it was not used solely to assess the reliability of hearsay evidence proffered for admission. *See* Maj. Op. 4832-33. The majority's excerpts are inapposite.

It is well-established, moreover, that trial judges may routinely consider inadmissible evidence to evaluate the competence of evidence actually proffered for admission. *See, e.g.*, Fed. R. Evid. 104(a). No decision by the Supreme Court or the Ninth Circuit has found this practice to contravene the minimum requirements of due process or to require additional procedural safeguards. By requiring such safeguards in parole revocation hearings, the majority departs from Supreme Court precedent and exceeds our limited authority to intervene in the criminal justice system of the fifty states. The majority declares: "[W]e are not bound to adhere only to minimal

requirements [of due process]." Maj. Op. 4831. The Supreme Court has stated: "Our task is limited to deciding the minimum requirements of due process." *Morrissey,* 408 U.S. at 488-89.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JERRY VALDIVIA, ALFRED YANCY, and HOSSIE WELCH, on their own behalf and on behalf of the class of all persons similarly situated, Plaintiffs, vs. ARNOLD SCHWARZENEGGER, Governor of the State of California, et al., Defendants.	Case No.: 2:94-CV-0671 LKK GGH P REPORT AND RECOMMENDATION REGARDING MOTION TO ENFORCE PARAGRAPH 24 OF THE *VALDIVIA* PERMANENT INJUNCTION (Filed Feb. 25, 2008)

INTRODUCTION

This Court entered a Stipulated Order for Permanent Injunctive Relief in this action ("Permanent Injunction") on March 9, 2004. Among its provisions is the following requirement:

> The use of hearsay evidence shall be limited by the parolees' confrontation rights in the manner set forth under controlling law as currently stated in *United States v. Comito*, 177 F.3d 1166 (9th Cir. 1999). The Policies and Procedures shall include guidelines and standards derived from such law.

See Ex. A at 6 (Permanent Injunction).

While Defendants distributed policies and procedures in 2004, the parties have not agreed as to their adequacy. Further dispute arose when, in 2006, Defendants wished to amend practices based on recent case law.

The parties met and conferred concerning this Permanent Injunction requirement in 2007. In August 2007, the parties determined that they wished to seek clarification of what the law requires in light of recent developments in case law. They chose to pursue a fact-finding hearing held by the Special Master with Report and Recommendation to the Court, and *de novo* review by the Court, as provided for in Paragraph IV.E of the Stipulation and Amended Order Re: Special Master Order of Reference.

On December 14, 2007, this matter came on for hearing. Documents were produced in response to two requests for production. Having reviewed the pleadings, arguments of counsel, and documents, the Special Master submits the following Report and Recommendation for the Court's consideration.

FINDINGS OF FACT

1. Policies and procedures concerning the application of *Comito* and related case law were distributed to Defendants' staff in July 2004. Ex. B at 68:16-69:17 (Reporter's Transcript of 12/14/07 Hearing).

2. As illustrated in the examples below, these policies and procedures contain inaccurate statements

concerning parolees' confrontation rights under the controlling law stated in *Comito*, 177 F.3d 1166. Ex. C (CDCR Resource Documents 1, 2, 3 ("RD")). For example, the "Hearsay" section of Resource Document 1 states that the *Comito* balancing test:

> balances the parolee's right to confrontation against the use of the hearsay evidence.

Ex. C, RD1 p. 8. As will be discussed *infra*, the test balances "the releasee's interest in his constitutionally guaranteed right to confrontation against the Government's good cause for denying it." *Comito*, 177 F.3d at 1170. The same document describes a Deputy Commissioner's task as:

> determining that the parolee's right to confront is outweighed by the trustworthiness of the evidence.

Ex. C, RD1 p. 8. While trustworthiness is a factor that can lessen the parolee's interest, under *Comito*, trustworthiness alone cannot completely outweigh that interest. *See infra* at 9. In Resource Document 2, a summary of the right to confront and cross-examine adverse witnesses indicates:

> the [Deputy Commissioner] can deny the confrontation of an adverse witness if it is shown that the witness is unavailable for good cause, or determined to be either fearful or confidential.

Ex. C, RD2 p. 3. This omits any mention of the required assessment of the parolee's interest in confrontation and weighing it against the described good

cause. A Resource Document 3 summary of the *Comito* balancing test reads:

> [the test] balances the parolee's right to confrontation against the need for the evidence to the disposition of the case and the trustworthiness of the information.

Ex. C, RD3 p. 2. This is the converse of the preceding example; it describes the assessment of the confrontation interest, but omits the good cause assessment prong of the test.

In these policies and procedures, there also are repeated references to all relevant evidence, or all hearsay evidence, being admissible. *See, e.g.*, Ex. C, RD1 pp. 2, 3, 4, 5, 12. While some references are accurately quoting statutes or regulations, the repeated references send a message contrary to the controlling law that some relevant or hearsay evidence should be excluded after conducting a balancing test.

3. Defendants assert that the distributed policies and procedures include guidelines and standards that comply with the mandate set forth in Paragraph 24 of the Permanent Injunction. Ex. B at 68:16-69:17. A review of those policies and procedures reveals that any guidelines and standards to be found therein are insufficiently detailed to provide the guidance contemplated by this Permanent Injunction requirement. Ex. C.

4. After the Ninth Circuit issued its opinion in *United States v. Hall*, 419 F.3d 980 (2005), Defendants informed Plaintiffs of their position that hearsay evidence that falls within a recognized hearsay exception may be admitted without applying the *Comito* balancing test. Ex. B at 6:25-8:20; Ex. A-Sealed at 1:7-12 (Reply Declaration of Ernest Galvan in Support of Plaintiffs' Motion to Enforce Paragraph 24 of the *Valdivia* Permanent Injunction).

5. The record indicates that Defendants have discussed changes to their policy concerning admission of hearsay exceptions but have not yet instructed their staff to admit proffered evidence under a hearsay exception without applying the *Comito* balancing test. Ex. 2 to Ex. F (Reply Declaration of Loren G. Stewart in Support of Plaintiffs' Motion to Enforce Paragraph 24 of the *Valdivia* Permanent Injunction); Ex. B at 8:24-9:5. In training in March and April 2007, Deputy Commissioners were told that Defendants were exploring the possibility of changing this practice, but to continue to apply the *Comito* balancing test at that time. Ex. 4 to Ex. A-Sealed at 46 (CDCR *Valdivia* Compliance Report 9/26/07). In a November 2006 Deputy Commissioner academy session, instructors mentioned hearsay exceptions but did not make any explicit link to any effect they may have on the *Comito* balancing test. Ex. D at 2:1-3 (Declaration of Loren G. Stewart in Support of Plaintiffs' Motion to Enforce Paragraph 24 of the *Valdivia* Permanent Injunction).

6. Only a small majority of experienced Deputy Commissioners are lawyers, as is only one of the recent hires. Ex. B at 81:1-21. Taken together, this means that a minority of the Deputy Commissioners currently serving are lawyers. While a background in law is not a requirement (*see Morrissey v. Brewer*, 408 U.S. 471, 489 (1972)), there is no evidence in the record that the non-attorneys have any familiarity with evidentiary law apart from the training Defendants provide.

7. Training provided to Deputy Commissioners consists of three to three and one-half hours of instruction in an academy shortly after their hire. Ex. E (Board of Parole Hearings Deputy Commissioner Training 12/20/07); Ex. D at 1:22-25. Continuing education was offered in and [sic] March and April 2007 for one and one-quarter hours. Ex. 5 to Ex. A-Sealed (Board of Parole Hearings Deputy Commissioner Workshop 3/27/07).

8. When Plaintiffs' counsel attended training sessions, they formed the opinion that the trainings "provided confusing and inconsistent messages regarding the standards and procedures to be followed under the controlling *Comito* case." Ex. D at 1:6-10, 2:4-13.

9. As described in the following paragraphs, all parties are aware that, in practice, there have been deficiencies in the application of *Comito* and related case law to evidentiary questions. Defendants have observed instances of Deputy Commissioners failing

to apply the required balancing test, and other instances where the balancing conducted was inconsistent with the *Comito* standard. Ex. B at 71:21-72:16. One of Defendants' staff asserted that it was a common mistake for Deputy Commissioners to admit evidence central to the ultimate finding *because* it was central to the finding, when such evidence should weigh against admission because it heightens the parolee's confrontation interest. Ex. D at 1:25-28. A Deputy Commissioner confirmed that was his approach during an interview with Plaintiffs' counsel. Ex. B-Sealed at 1:23-24 (Reply Declaration of Anne Mania in Support of Plaintiffs' Motion to Enforce Paragraph 24 of the *Valdivia* Permanent Injunction).

10. Plaintiffs' counsel have observed Deputy Commissioners failing to apply the required balancing test, and other instances where, in Plaintiffs' counsel's assessment, the balancing conducted did not follow the *Comito* standard. Ex. 1 to Ex. B at 5-7 (Notice of Motion and Motion to Enforce Paragraph 24 of the *Valdivia* Permanent Injunction); Ex. B-Sealed. Plaintiffs' counsel have also observed confusion about the standard expressed by Deputy Commissioners and Associate Chief Deputy Commissioners as recently as March 2007. Ex. D at 2:4-13.

11. Documents concerning revocation hearings, submitted as evidence by Plaintiffs, contain two examples of a Deputy Commissioner incorrectly applying the relevant balancing test. One discussion reads:

> P's interest in confrontation weighed against the importance of witnesses' testimony to the final finding of fact is lesser than the reliability of the hearsay evidence and the corroboration of it.

Ex. 3 to Ex. C-Sealed at 5 (Reply Declaration of Kristen Palumbo in Support of Plaintiffs' Motion to Enforce Paragraph 24 of the *Valdivia* Permanent Injunction). No reason was given for the declarants' absence. *Id.* at 1. The established test is to balance the parolee's confrontation interest against the State's good cause for denying it; in the absence of any discussion of good cause for declarants' absence, the correct balancing test could not have been carried out. Additionally, importance of the evidence to the ultimate finding is a factor that heightens the parolee's confrontation interest, not a factor to be weighed against it. *See infra* at 9.

In another revocation hearing, the Deputy Commissioner acknowledged multiple prongs to the test but did not employ them. Ex. E-Sealed at 3:17, 4:21-24; Ex. F-Sealed; Ex. H-Sealed at 34:4-37:3 (Transcript of Revocation Hearing for Parolee 2).[1] She considered the reliability of the hearsay based on its status as, or similarity to, documents that would fall under a business records exception, as well as reliability established by corroborating evidence. Ex.

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[1] To the extent that any portions of Ex. G-Sealed have not been authenticated, the Special Master takes judicial notice of the transcript under Federal Rule of Evidence 201.

H-Sealed at 34:4-37:3. The Deputy Commissioner did not discuss the strength of the parolee's confrontation interest, the importance to the ultimate finding, or the good cause for not producing the declarants, nor the relative weight among them. *Id.*

12. Transcripts of audiotaped revocation hearings, submitted as evidence by Plaintiffs, contain an example of a Deputy Commissioner dismissing a confrontation rights objection without applying the relevant balancing test. Ex. 1 to Ex D-Sealed at 8:1-12 (Reply Declaration of Shirley Huey in Support of Plaintiffs' Motion to Enforce Paragraph 24 of the *Valdivia* Permanent Injunction).

13. The administrator of the panel of attorneys representing parolees in hearings has disagreed with some applications of the *Comito* standards. Ex. 1 to Ex. A-Sealed at 34 (First Report of the Special Master on the Status of Conditions of the Remedial Order).

14. Interviewing some Division of Adult Parole Operations staff gave the Special Master the impression that they hold many uncertainties and misinformation regarding hearsay information and *Comito* requirements. Ex. 1 to Ex. A-Sealed at 34. Those staff perceived Deputy Commissioner decisions in applying the *Comito* standard to be inconsistent and sometimes inappropriate. *Id.* As recently as August 2007, many Division of Adult Parole Operations staff reported to Defendants' self-monitoring teams that they were confused about providing evidence under the standards. Ex. 4 to Ex. A-Sealed at 47; Ex. 3 to

Ex. A-Sealed at 9-11 (CDCR *Valdivia* Monitoring Report Santa Rita County Jail).

15. The above-described confusion and inconsistency was observed and expressed three years into implementation of policies and procedures arising from *Valdivia* Permanent Injunction Paragraph 24 obligations. (Policies distributed in July 2004 – Ex. B at 69:15-17; observations March 2007 and August 2007, *supra*.)

16. The scope of the problems detailed above is unknown at this time. Defendants have not tested Deputy Commissioners' understanding subsequent to training. Ex. B at 69:22-70:12. During self-monitoring visits and staff supervision, Defendants observe some Deputy Commissioners in hearings, as do Plaintiffs in their monitoring, but neither party has undertaken any systematic assessment of Deputy Commissioners' skill and accuracy in applying the legal standards concerning confrontation rights. Ex. B at 70:13-71:15.

17. A case presented as evidence by Plaintiffs includes a Deputy Commissioner sustaining a confrontation rights objection and postponing the revocation hearing in response. Ex. E-Sealed at 6:15-19, 7:6-10 (Declaration of Shirley Huey in Support of Plaintiffs' Notice of Motion and Motion to Enforce Paragraph 24 of the *Valdivia* Permanent Injunction); Ex. F-Sealed (Plaintiffs' Notice of Lodging of Revocation Hearing Transcripts); Ex. G-Sealed at 16:21-25, 23:25-24:20

(Transcript of Revocation Hearing for Parolee 3).[2] The parolee admitted a charge and did not admit two others. Ex. G-Sealed at 10:9-11:2.

His attorney argued the need to cross-examine several listed witnesses, including the alleged victim, percipient witnesses, and involved law enforcement; those witnesses were subpoenaed and did not appear. Ex. G-Sealed at 7:2-8:13, 16:21-25, 21:24-22:22. Concerning some of the witnesses, there was some discussion concerning contact efforts, nonappearance reasons, and assistance, but information was limited. Ex. G-Sealed at 7:9-8:13, 14:4-15:3, 16:10-17, 22:23-23:24. The reasons for the arresting or investigating officers' failure to appear were not discussed. *Id.*

The Deputy Commissioner did not apply a *Comito* balancing test to determine whether to admit the proffered hearsay derived from the absent witnesses. Ex. G-Sealed at 16:21-25, 23:25-24:20. He found good cause on the admitted charge and postponed the hearing as to the other two charges while encouraging the parties to secure the witnesses' appearance. Ex. G-Sealed at 23:25-24:20.

18. The scope is unknown for the practice of Deputy Commissioners postponing hearings in order for the State to present more competent evidence after a confrontation rights objection. Neither party

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[2] To the extent that any portions of Ex. G-Sealed have not been authenticated, the Special Master takes judicial notice of the transcript under Federal Rule of Evidence 201.

has undertaken a systematic review. Ex. B at 37:7-40:21.

19. The mechanism available for reviewing a disputed evidentiary decision is a writ of *habeas corpus* to the Superior Court. Ex. B at 75:15-21. Regulations provide for a process for the Board of Parole Hearings to review decisions of Deputy Commissioners. The record is not clear as to whether this process is available to parolees. Ex. B at 77:8-79:2, 82:7-12.

CONCLUSIONS OF LAW

I. Parolees' Right to Confrontation

20. The Fifth and Fourteenth Amendments serve as the source of the rights of a parolee in a revocation proceeding; he is not entitled to the full protections of the Sixth Amendment. *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972); *United States v. Hall*, 419 F.3d 980, 985-86 (9th Cir 2005). Among the more limited rights due process affords, however, is the right "to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)." *Morrissey*, 408 U.S. at 489.

21. For purposes of a due process analysis, courts have treated parole revocation, probation revocation, and supervised release proceedings as essentially equivalent. *United States v. Martin*, 984 F.2d 308, 310 (9th Cir. 1993) (citing *Gagnon v. Scarpelli*,

411 U.S. 778 (1973) and Fed. R. Crim. P. 32.1). The authority cited *infra* will draw on each of the types of proceedings.

22. In the Ninth Circuit, the prevailing method of determining whether to admit hearsay without the ability to confront the adverse witness is to apply a balancing test laid out in *United States v. Comito*, 177 F.3d 1166 (9th Cir. 1999). The test requires the decisionmaker to determine the degree of the parolee's interest in confrontation and weigh that against the government's good cause for not producing the adverse witness. *Id.* at 1170. This is a very individualized determination based on the facts and circumstances of each case. *Id.* at 1172; *United States v. Martin*, 984 F.2d 308, 310-11 (9th Cir. 1993).

23. Factors that heighten the parolee's interest include the importance of the proffered evidence to the ultimate finding and low reliability of the evidence. *Martin*, 984 F.2d at 311. Common factors going to the government's good cause include the efforts taken to produce the witness, the difficulty and expense of doing so, and concerns for the safety of a confidential informant. *Hall*, 419 F.3d at 988; *Gagnon*, 411 U.S. at 783 n.5; *Morrissey*, 408 U.S. at 487. Other factors may be taken into account, such as the severity of the penalty potentially to be imposed. *Martin*, 984 F.2d at 312.

II. Hearsay Exceptions

24. The parties disagree about the treatment of hearsay exceptions in revocation proceedings. When proffered evidence falls within a hearsay exception, Plaintiffs take the position that decisionmakers should take this into account by adjusting the weight given in the balancing test in accord with the reliability traditionally associated with such evidence. Ex. 1 to Ex. B at 13:23-14:4. Defendants take the position that proffered evidence falling within a hearsay exception can be admitted without more. Ex. 2 to Ex. B at 2:5-8. Defendants argue that (1) to do otherwise is to afford more rights to parolees facing revocation than to accused criminals facing prosecution and (2) the indicia of reliability inherent in such evidence establishes good cause for denying confrontation sufficient to render balancing unnecessary. *Id.* at 9:9-11, 2:8-12.

Authority for use of hearsay exceptions in revocation proceedings

25. Neither the Supreme Court nor the Ninth Circuit has ruled directly on whether hearsay exceptions obviate the need for a balancing test in parole revocation proceedings. As discussed below, while some Ninth Circuit authorities suggest the court may favor admitting proffered evidence on the basis that it falls within a hearsay exception, the question has not been posed directly to the court; rather, the inference arises from *dicta* or from the types of evidence it allowed.

Hall gives perhaps the strongest indications of the Ninth Circuit's inclination concerning hearsay exceptions. In *Hall*, the court considered whether due process was satisfied when unsworn verbal allegations regarding two separate charges were admitted in a supervised release revocation proceeding. *Hall*, 419 F.3d at 986-89. The court began by employing the *Comito* balancing test in analyzing the first charge. *Id.* at 986. It determined that the defendant's interest in confronting the unsworn statements as to that charge was fairly low because there was sufficient nonhearsay evidence to sustain the charge and the hearsay therefore added little to the ultimate finding. *Id.*

The court then went on to add a paragraph that is not anchored either in what precedes it or follows it. The court wrote:

> In addition, several pieces of evidence supporting the domestic violence allegation are admissible under hearsay exceptions. Although the Federal Rules of Evidence do not strictly apply to revocation hearings [citations omitted], long-standing exceptions to the hearsay rule that meet the more demanding requirements for criminal prosecutions should satisfy the lesser standard of due process accorded the respondent in a revocation proceeding.

Id. at 987 (emphasis added). The court then concluded its balancing without expressly employing the evidence subject to hearsay exceptions. *Id.* It did not

discuss how such evidence would or should be used within a balancing test. It did not rule that evidence that falls within a hearsay exception obviates the need for *Comito* balancing. It made this assertion and then continued and completed the balancing test. The court did not discuss hearsay exceptions when it went on to apply the *Comito* balancing test to the evidence of the second charge. *Id.* at 987-89. The evidence subject to hearsay exceptions was not at issue in the appeal. Given the equivocal language ("*should* satisfy" due process) and the lack of a direct ruling, this *dicta* is arguably indicative of the court's inclinations, but cannot be said to be dispositive on the hearsay exception issue.

26. Other relevant Ninth Circuit cases cited by the parties preceded *Comito* and did not discuss hearsay exceptions as a whole. The cases implicitly raised the business document and public records exceptions by virtue of the types of contested evidence at issue; one of these cases explicitly mentioned the public records exception.

In *United States v. Walker*, 117 F.3d 417 (9th Cir 1997), the court found it was harmless error to admit evidence of a single date from documentary hearsay that should have been subjected to a balancing test but was not. *Walker*, 117 F.3d at 420-21. The court's rationale focused on the reliability of the date in light of the defendant's failure to challenge the document's reliability and to present contrary evidence. The court noted, but did not rule, that the document was "*most*

likely admissible as a public records exception." *Id.* (emphasis added).

In *United States v. Simmons*, 812 F.2d 561 (9th Cir 1987), the court held that admission of hospital records at a probation revocation hearing was not plain error in light of the "traditional indicia of reliability that these records bear." *Id.* at 564-65. The court's analysis appears to attach to the specific evidence in the case – hospital records.

In *United States v. Miller*, 514 F.2d 41 (9th Cir 1975), the court found no prejudice to defendant when the lower court admitted into evidence unauthenticated copies of state court criminal records, which showed that defendant had been convicted of criminal offenses while on probation. Although the defendant had objected to the introduction of the records at the revocation hearing, he had not challenged the accuracy of the information revealed by the records, nor had he offered any evidence to refute the claimed convictions. *Miller*, 514 F.2d at 42. Based on these facts, the court found the unrefuted evidence reliable and admissible under *Morrissey* and *Gagnon*. *Id.* at 42-43,

Martin discussed the expectations of reliability that should be accorded urinalysis reports, implicitly as evidence commonly treated as a business records exception. *Martin*, 984 F.2d at 313-14. The court held that the defendant had a right to confront that evidence to impeach factors such as efficacy of procedures, experience, and qualifications. *Id.* at 312-14.

In nearly all of the cases discussed above, the court's language, indicates that the narrow facts – a date, a court's record of convictions – are particularly significant to the holding. *Walker*, 117 F.3d at 421; *Miller*, 514 F.2d 41; *Simmons*, 812 F.2d at 564-65. One case suggests recognizing documents subject to one hearsay exception (*Walker*, 117 F.3d 417); another rejects categorically admitting even a subset of that same hearsay exception (*Martin*, 984 F.2d at 313-14). There does not appear to be a clear record for treating these rulings as generalizable. Indeed, the court in *Martin* wrote:

> [A]rbitrariness is achieved just as surely by the incremental creation of blanket exceptions as by the outright abandonment of fair procedure.

Martin, 984 F.2d at 314 n.9.

27. All of the Ninth Circuit cases, including those appearing to advocate admission on the basis of hearsay exceptions, continue to recognize the *Comito* balancing test as the norm. None of these cases admits a contested piece of evidence expressly on the basis that it falls within a hearsay exception and without conducting a balancing test. Nor does any court rule directly on whether hearsay exceptions categorically establish admissibility. While the Ninth Circuit may use the cited cases as a basis to extend its holdings in the future, it has not yet done so.

28. The Second Circuit, on the other hand, does appear to hold that hearsay exceptions render the

balancing test unnecessary. In *United States v. Jones*, 299 F.3d 103, 113 (2d Cir. 2002), the court found it was not an abuse of discretion to admit evidence under the present sense impression and excited utterance exceptions. *Jones*, 299 F.3d at 113. The Second Circuit distinguished the case from preceding authority requiring a balancing test on the basis that hearsay exceptions applied. *Id.* Alternatively, the court wrote, in the Second Circuit's balancing test, the hearsay exceptions would serve to satisfy the required element of reliability. *Id.* at 113-14. In reaching that conclusion, however, the court relied on cases whose validity has now been called into question by a subsequent United States Supreme Court decision (see *infra* at 15-16).

United States v. Aspinall, 389 F.3d 332 (2d Cir 2004), followed the rule laid out in *Jones*, applying it to documents potentially falling under the business records exception. *Aspinall*, 389 F.3d at 343-46. *United States v. Williams*, 443 F.3d 35 (2d Cir 2006), also cited this rule, although it went on to conduct a balancing test because the involved hearsay exception was not firmly rooted. *Williams*, 443 F.3d at 45-46.

29. One other Circuit offers reason to believe it might employ hearsay exceptions in parole revocation proceedings. In *Prellwitz v. Berg*, 578 F.2d 190 (7th Cir. 1978), the Seventh Circuit cited the *Morrissey* dictates of a:

> right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation),

but then wrote,

> forcing the state to show good cause for not producing the hearsay declarant would unwisely extend the limited due process rights of a probationer at the revocation hearing.

Prellwitz, 578 F.2d at 192. The basis for rejecting the *Morrissey* requirement was not made explicit. The Ninth Circuit, in *Comito*, expressly held that requiring the state to show good cause was critical. *Comito*, 177 F.3d at 1170.

The court in *Prellwitz* offered two reasons that admitting the contested evidence was proper: that the documents were a "conventional substitute for live testimony" permitted by *Gagnon* and that they bore indicia of reliability, using language suggesting this was premised on the business records exception. *Prellwitz*, 578 F.2d at 192-93. This case, however, preceded *Comito* by two decades, and as noted, employed rationale that *Comito* squarely rejected.

Rights in relation to criminal defendants

30. It is a significant concern that procedures for parolees do not exceed the rights due criminal defendants. As noted above, it is well-established that the process due in parole revocation and similar

proceedings is distinctly limited in relation to the rights of criminal defendants, and that due process for parolees arises from the Fifth and Fourteenth Amendments rather than the Sixth Amendment. *Morrissey*, 408 U.S. at 482; *Hall*, 419 F.3d at 985-86.

Defendants cite to two Supreme Court decisions, which held that evidence that falls within a firmly-rooted hearsay exception has sufficient guarantees of reliability to satisfy the Confrontation Clause requirements in criminal proceedings. Ex. 2 to Ex. B at 6:3-14, citing *White v. Illinois*, 502 US 346 (1992); *Idaho v. Wright*, 497 US 805 (1990). Defendants argue that, given the High Court's decisions, that same evidence should be sufficiently reliable to be admitted under the less rigorous protections in a revocation proceeding, a principle discussed in *Hall*. Ex. 2 to Ex. B at 6:3-14.

Plaintiffs argue that the principle announced in *White* and *Wright* was overturned in *Crawford v. Washington*; Plaintiffs are only partially correct. Ex. 3 to Ex. B at 5:7-7:2. In *Crawford*, the Supreme Court held that testimonial evidence could not be admitted without confrontation in a criminal trial unless the declarant was unavailable and the accused had had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). But the Court expressly limited its holding to testimonial evidence, which, while not fully defined, included, at a minimum, prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and police interrogations. *Crawford*, 541 U.S. at 68. The Court

left open the possibility that its earlier cases might still control as to other types of hearsay. *Crawford*, 541 U.S. at 68. ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law-as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.") The Court expressly declined to say whether it would overrule *White*, one of the cases standing for the proposition that hearsay within a firmly rooted exception satisfies the Sixth Amendment Confrontation Clause. *Id.* at 61.

The Supreme Court has subsequently ruled on one distinguishing aspect between testimonial and nontestimonial evidence in the context of statements to police. *Davis v. Washington* (2006) ___ U.S. ___ [165 L.Ed.2d 224, 126 S.Ct. 2266]. In *Davis*, the Court found that statements, which the trial court had treated as excited utterances and present sense impressions, were testimonial because they were made after the events and the primary purpose was to establish or prove past events potentially relevant to later criminal prosecution. *Id.* at 2272, 2273-74. It does not appear that the Supreme Court has issued any further decisions concerning the treatment of hearsay exceptions after *Crawford*.

Thus, it is unsettled whether, and which, hearsay exceptions now provide guarantees of trustworthiness sufficient to satisfy the demands of the Confrontation Clause. *United States v. Weiland*, 420 F.3d 1062, 1076 (9th Cir 2005) ("If the evidence is nontestimonial,

there is uncertainty as to whether the 'indicia of reliability' or firmly rooted hearsay exception test enunciated in *Ohio v. Roberts* survives *Crawford*." [citations omitted])

It is undisputed that *Crawford* does not apply to parole revocation and similar proceedings. *See Hall*, 419 F.3d at 985. Given the uncertainty in the law in the criminal context, however, no analogy can be drawn as to the standard for admission in the more flexible revocation proceedings. In the absence of clarity about criminal defendants' rights, the Special Master cannot say whether the *Comito* balancing test would afford greater or lesser rights to parolees.

31. More persuasive is the argument that, when viewed in context, parolees continue to have significantly fewer rights in revocation proceedings. Ex. 3 to Ex. B at 4:20-27. Even if it were determined that not treating hearsay exceptions as *per se* admissible affords greater rights to parolees than criminal defendants, the advantage is limited to that aspect of the proceeding. Criminal defendants receive the full protections of the Confrontation Clause, other aspects of the Sixth Amendment, the rules of evidence, and the State's higher burden of proof, none of which is available to parolees facing revocation. *Id.*

Reliability as an independent test

32. Defendants present several arguments concerning the role of reliability in determining the

admissibility of hearsay. They argue that the indicia of reliability inherent in hearsay exceptions provide an independent basis for admission, rendering any balancing test unnecessary. Ex. 2 to Ex. B at 2:5-12, 7:12-13; Ex. 4 to Ex. B at 6:16-17. Alternatively, Defendants argue that indicia of reliability establish good cause for denying confrontation, either because reliability alone, can satisfy good cause (Ex. 2 to Ex. B at 2:11-12; Ex. 4 to Ex. B at 2:17-19, 6:16-17, 8:18-23), or because reliability is one of the factors in determining good cause (Ex. 2 to Ex. B at 3:24-26, 10:18-19; Ex. 4 to Ex. B at 3:23-28). Assuming *arguendo* that reliability of evidence can establish good cause, Defendants do not explain whether, or how, such good cause automatically outweighs the confrontation right in every instance. Finally, Defendants also indicate that reliability may be a factor on *both* sides of the balancing test. Ex. 2 to Ex. B at 11:4-16.

33. The courts' use of reliability has been highly inconsistent. Some of the Ninth Circuit's earlier cases decided hearsay admissibility on reliability alone. *Miller*, for example, allowed in unauthenticated, but unrefuted, copies of court file contents, declaring them reliable without further discussion. *Miller*, 514 F.2d 41. *Simmons* noted a line of cases, including *Miller*, which determined admissibility of evidence using the reliability rationale. *Simmons*, 812 F.2d at 564. Although the court in *Simmons* identified *Morrissey* and *Gagnon* as calling for a balancing of the defendant's right to, confrontation against the government's good cause for denying it, it did not apply that test. The court affirmed the admission of

certified hospital records on the basis of their traditional indicia of reliability. *Id.* at 564-65.

The Ninth Circuit next began applying the balancing test described in *Simmons* and treated reliability as an element of the good cause prong. *See Martin*, 984 F.2d at 312 (determining degree of good cause by looking to both the difficulty and expense of procuring witnesses *and* the traditional indicia of reliability of the proffered evidence). *Walker* reinforced the balancing test as a requirement but acted on the basis of reliability alone to find that admission without balancing was harmless error. The evidence at issue was solely a date and was unrefuted. *Walker*, 117 F.3d at 421.

The *Comito* decision followed, endorsing and developing the previously announced balancing test. *Comito* dictates considering reliability when assessing the confrontation right prong of the test:

> Comito's interest in confronting Connell directly was further strengthened by the nature of the disputed hearsay evidence. Unsworn verbal allegations are, in general, the least reliable type of hearsay, and the particular utterances at issue here bore no particular indicia of reliability. . . . Because the hearsay evidence was important to the court's finding, and because it involved the least reliable form of hearsay, Comito's interest in asserting his right to confrontation is at its apogee.

Comito, 177 F.3d at 1171.

The only subsequent Ninth Circuit case on point that the parties have identified appears to use reliability three different ways at different points in the opinion. In *Hall*, the court first used reliability in determining the degree of the parolee's confrontation right. *Hall*, 419 F.3d at 988. Following *Martin*, the court then weighed reliability as one factor on the good cause side of the balance as well. *Id.* When summarizing that same section, however, the court seemed to say that reliability was a factor *separate* from good cause. *Id.* at 989. ("Although Hall had a strong interest in confronting Hawkins with regard to the false imprisonment charge, on balance, that interest is outweighed by the government's good cause for not producing Hawkins as a witness *and* the independent indicia of reliability that support Hawkins' statements to Officer Gross." (emphasis added))

34. Other, varied practices are evident in other circuits. The Second Circuit seems to *add* reliability to the balancing test, weighing both reliability and good cause against the right to confrontation (unless the evidence has already come in under a hearsay exception, as discussed above). *See United States v. Chin*, 224 F.3d 121, 124 (2d Cir 2000); *accord Aspinall*, 389 F.3d at 343; *accord Williams*, 443 F.3d at 45.

35. The cases that indicate that reliability alone suffices for admission are the United States Supreme Court cases whose validity has been called into question by *Crawford*; Seventh, Second, and Fourth circuit cases; and California state cases. *See, e.g.*,

Idaho v. Wright, 497 U.S 805 (1990); *United States v. Jones*, 299 F.3d 103 (2d Cir 2002); *Prellwitz v. Berg*, 578 F.2d 190 (2d Cir 1978); *United States v. McCallum*, 677 F.2d 1024, 1026-27 (4th Cir.), *cert. denied*, 459 U.S. 1010, 103 S.Ct. 365, 74 L.Ed.2d 400 (1982); *People v. Maki*, (1985) 39 Cal.3d 707; *People v. Abrams*, No. B194835, slip op. at ___ (Cal. Ct. App. Dec. 21, 2007).

36. *Comito* established its balancing test after the cases in which reliability was used as the sole basis for admission, save two California Court of Appeal cases. Given that the Ninth Circuit initially used a reliability approach, and then adopted a multi-factorial test throughout the 1990s, it is reasonable to assume that the Ninth Circuit deemed reliability, alone, an insufficient basis for admission. Indeed, in *Comito*, the court rejected the argument that reliability was enough on its facts, given the defendant's heightened confrontation interest:

> The Government also argues that, even absent a showing of difficulty in obtaining Connell's testimony, the hearsay evidence bears sufficient indicia of reliability, by virtue of the other testimony and evidence presented at the hearing, to make it admissible. Given the substantial nature of Comito's interest in confrontation and the absence of good cause for the Government's failure to produce the adverse witness, the supporting or corroborative evidence noted by the Government cannot suffice to deprive Comito of his constitutional right to confrontation.

Comito, 177 F.3d at 1172. *Martin*, likewise, used very strong language in rejecting the sole reliance on reliability on its facts:

> In essence, the government urges us to hold that urinalysis reports are so inherently reliable that they may be introduced in any revocation hearing. . . . such a blanket rule would be tantamount to abandonment of the *Simmons* balancing test; we would effectively hold that the weight of the defendant's right to confrontation is irrelevant in revocations involving urinalyses . . .

Martin, 984 F.2d at 313. *Hall*, too, followed *Martin's* rejection of a blanket rule based on reliability when the court analyzed the second charge against the defendant. *Hall*, 419 F.3d at 988. The court added that, even when the evidence in question was reliable and corroborated, the defendant's "strong interest in confrontation is somewhat lessened by the reliability of the hearsay evidence, but it is not defeated" and completed the balancing test. *Id.* Thus, the most recent Ninth Circuit cases all identify circumstances in which reliability alone is insufficient, illustrating the need for a balancing test.

Conclusion as to hearsay exceptions

37. The existing case law does not provide sufficient reason for varying from established precedent. The Ninth Circuit cases support the continued use of the *Comito* test and do not provide a clear path toward treating hearsay exceptions differently.

Persuasive authority varies substantially from the Ninth Circuit's reasoning in ways that the Ninth Circuit, through its writings, seems disinclined to adopt. *See, e.g., Martin*, 984 F.2d at 313-314; *Comito*, 177 F.3d at 1170.

The *Comito* balancing test serves all necessary purposes well. It serves administrative flexibility, one of the primary goals of the revocation proceedings jurisprudence. It recognizes that hearsay exceptions have an important role in admission decisions, by increasing reliability and reducing the weight of the parolee's interest in the balance. It helps ensure that revocation decisions are based on verified facts, to both the parolees' and the State's benefit. Use of the test does not give parolees more rights than criminal defendants who are protected by the rules of evidence, the Confrontation Clause, and other guarantees not afforded to parolees. Without any mandate arising from the case law, any change would be within this Court's discretion. The Court should opt to retain the existing standard set forth in *Comito*.

In fact, *per se* admission based on hearsay exceptions would likely have unintended deleterious effects on justice, predictability, and administrative flexibility. Those cases favoring the categorical admission based on hearsay exceptions involved supervised release and probation revocation decisions that were made by judges. *See, e.g., Williams*, 443 F.3d 35; *Jones*, 299 F.3d 103; *Aspinall*, 389 F.3d 332; *Hall*, 419 F.3d 980. Fewer than half of Defendants' hearing officers (Deputy Commissioners) are lawyers. Ex. B at 81:1-21.

The record shows that some of Defendants' staff, the Special Master, and observers already perceive confusion and unreasonable variability in the application of the existing balancing test. Findings of Fact, *supra*, ¶ 9-16. To introduce, as new concepts, the nuances of hearsay exceptions and all of their conditions, and to require facility in applying those tests as well as the *Comito* balancing test – including recognizing and managing hearsay that requires balancing that exists within evidence admissible under an exception – is an invitation to worsening predictable outcomes consistent with due process, not to mention undermining the administrative ease and flexibility meant to attach to these less formal proceedings.

III. Corroboration for hearsay

38. In applying the balancing test, corroboration may increase reliability for proffered hearsay. Defendants argue that various types of proffered evidence may serve as corroboration, including other hearsay; Plaintiffs disagree. Ex. 2 to Ex. B at 9:26-28.

39. While neither party offers federal authority directly on point, Defendants cite *Hall* and *Comito* as examples where hearsay was used to corroborate other hearsay, suggesting implicit endorsement of the practice. Ex. 2 to Ex. B at 10:2-4.

In *Hall*, the court analyzed separately the alleged victim's unsworn statements concerning a domestic violence allegation and a false imprisonment violation. *Hall*, 419 F.3d at 986-89. Because the government's

good cause was found to outweigh the defendant's interest in confronting the hearsay offered on the first charge, the evidence was admitted. *Id.* at 987. The court then considered corroboration for the hearsay offered on the second charge. The corroboration took the form of: the hearsay statements on the first charge that were admissible by virtue of surviving the *Comito* balancing test, four pieces of testimony based on direct observations, defendant's admissions, and four pieces of testimony recounting the alleged victim's unsworn verbal allegations to those witnesses. *Id.* at 988. Thus, the court used both hearsay and nonhearsay evidence to corroborate the hearsay at issue; it did not discuss the differences between the types of corroboration, nor did it rule on what types are permissible.

In *Comito*, the court examined whether nonhearsay and hearsay evidence supported the *charge*; the court did *not* consider whether the corroborating evidence should make the contested piece of hearsay admissible. *Comito*, 177 F.3d at 1168-69. In fact, it noted:

> [w]hile the additional evidence may also be subject in whole or in part to valid objections based on hearsay and Comito's right to confrontation, those challenges are not raised before us.

Id. at 1169. This *dictum* emphasizes that the court was only working with the record before it; the gratuitous inclusion suggests that the court might not otherwise have admitted or used that hearsay. This

court also did not rule on what types of corroboration are permissible.

40. There are also persuasive California state cases that may be useful to consider. The California Supreme Court considered corroborating evidence while applying a test similar to that employed in *Comito*. In *People v. Arreola* (2004) 7 Cal.4th 1144, the California Supreme Court specified that corroborating evidence must itself be admissible:

> Thus, in determining the admissibility of the evidence on a case-by-case basis, the showing of good cause that has been made must be considered together with other circumstances relevant to the issue, including . . . whether other *admissible* evidence, including, for example, any admissions, made by the probationer, corroborates the former testimony . . .

Arreola, 7 Cal. 4th at 1160 (emphasis added).

Similarly, one California appeals court ruled against California's Board of Parole Hearings in a challenge to the exact practice the Board now proposes. *See In re Miller* 145 Cal.App.4th 1228 (Cal.Ct.App. 2006). In *Miller*, to corroborate the alleged victim's unsworn verbal statements to a law enforcement officer, the State offered hearsay statements of third-party witnesses and an uncertified medical report containing further unsworn statements by the alleged victim. *Id.* at 1238. The court rejected this, writing:

> adopting such a criterion would eviscerate the need to provide indicia of reliability before

> hearsay evidence is received. Were this standard adopted, unreliable hearsay evidence could become reliable simply by attributing the evidence to several sources.

Id.

41. While the cases concerning corroboration raise uncertainties, on balance, it appears that these courts expect corroboration to come from competent evidence. This is certainly consistent with traditions, and the Special Master recommends a ruling that corroboration may only be drawn from admissible evidence, which may include hearsay that has survived its own *Comito* balancing test analysis.

IV. Continuing hearings beyond the *Valdivia* deadline

42. Plaintiffs allege that Defendants sometimes respond to a confrontation rights objection by postponing the hearing beyond the deadline prescribed by the Permanent Injunction, as an opportunity to provide more competent evidence. Ex. 1 to Ex. B at 19:9-24. It is undisputed that this practice occurs, though Defendants take the position that seeking further evidence for this reason can constitute good cause for exceeding the deadline. Ex. B at 92:4-8. Plaintiffs provided the revocation hearing record of a case in illustration. *See supra* at 7-8. The record contains no further evidence of the potential frequency or impact of such a practice. Ex. B at 37:7-40:21. Neither party provided authority for their positions.

43. There is merit to the arguments that a parolee has a right to expect a *final* hearing within 35 days, as required by Paragraph 22 of the Permanent Injunction, and that the State must meet or fail in its burden by that time, absent unforeseeable events. However, there is not sufficient evidence in the record to support a court order, so the Special Master does not recommend one.

V. Representation for writs of habeas corpus

44. Plaintiffs take the position that, in order to enforce confrontation rights, parolees should have representation available for writs of *habeas corpus*. Ex. 1 to Ex. B at 20:22-21:3. Plaintiffs assert that Defendants should be required to fund this representation because the complexity of the issues necessarily carries the risk of error, implementation has been problematic long-term, and the rights at stake are critical. Ex. B at 79:16-80:25; Ex. 1 to Ex. B at 20:15-21:16.

Plaintiffs note that Defendants committed to funding writ representation as to one other potential violation of the Permanent Injunction, designation of confidential information. Ex. 1 to Ex. B at 21:3-5. Appellate representation is not funded for any other Permanent Injunction provision, so this would be a significant departure from current practice and a substantial increase in Defendants' obligations. The risk of harm to individuals whose confrontation rights are denied unreasonably is, without a doubt, significant.

Were those parolees entirely without a remedy, we would face a different situation, but they do have the remedy of writs of *habeas corpus*. It is likely that many parolees' lack of sophistication and resources hinder effective use of this system. But the parties did not present any authority compelling Defendants to take responsibility for counteracting this, or any reason to believe that the proposed funding would not be better spent on an internal system to identify and rectify these problems directly. The Special Master recommends denying the request for an order requiring Defendants to fund such representation.

RECOMMENDATIONS

A. Defendants distributed policies and procedures as required by the relevant provision of the Permanent Injunction. Defendants provide some instruction on applying the legal standards and exercise some oversight. When Defendants took a position that their obligations had changed, it was based on a good faith interpretation of the case law. It appears that they have not instructed Deputy Commissioners to vary from *Comito* balancing. They negotiated policy revisions in good faith and sought clarification of the legal standards before proceeding further in negotiations. Therefore,

   - The Court should not find a violation of the Permanent Injunction.

B. Nevertheless, Defendants have not demonstrated that they are in compliance with Paragraph 24 of

the Permanent Injunction. Confusion, inconsistency, incorrect application of standards, and failure to apply the required tests have been known for a prolonged period. Yet Defendants have taken no action to identify the scope of the problem and have not taken adequate steps to address the conditions that perpetuate potential misapplications of the law.

Those conditions include the fact that some hearing officers have little experience in the law, training has been limited, policies and procedures contain inaccurate statements of applicable law, and Defendants have not subsequently assessed Deputy Commissioners' understanding nor provided detailed standards, guidelines, or tools to support decisionmaking.

Failures in evidentiary decisions carry a high risk of harm, including the denial of due process and denial of liberty without evidence adequate to meet the State's burden of proof. Defendants have not demonstrated the capacity to independently remedy these deficiencies. Therefore the Court should order:

1. The parties must undertake forthwith, and sustain, efforts to revise policies and procedures, including guidelines and standards, that incorporate these principles:

- Decisions about whether to admit proffered hearsay must be made on case-by-case basis. The weight accorded the balancing test factors, contested evidence, and supporting evidence will vary with facts and circumstances.

- Parolees have a right to confront and cross-examine adverse witnesses unless the Deputy Commissioner specifically finds good cause for not allowing confrontation; these two factors must be weighed against each other.

- The principal factors in assessing the weight of a parolee's confrontation interest are (1) the importance of the proffered evidence to the ultimate finding and (2) the nature of the facts to be proven by the proffered evidence, which tends to be treated as an assessment of reliability.

- The parolee's interest in confronting the contested evidence is high if the evidence will be important to the ultimate finding or if the evidence is potentially unreliable.

- If the proffered evidence would be admitted in civil or criminal proceedings under a hearsay exception, this increases its reliability and makes it more likely to be admitted because the parolee's interest is lessened.

- If nonhearsay evidence corroborates the proffered hearsay, this also increases reliability and makes the hearsay more likely to be admitted. Hearsay *cannot* be used to corroborate proffered hearsay unless it, too, survives a *Comito* balancing test.

- The severity of the penalty a parolee faces is also a factor that could affect his confrontation interest.

- The Deputy Commissioner must assess the good cause for the witness not testifying.

This includes, at least, inquiring into the efforts made to have the witness attend, whether attendance is difficult or expensive, and whether the witness is a confidential informant whose identity is unknown to the parolee.

- Reliability of the hearsay is *not* a factor in determining whether the state had good cause not to produce a witness.

- Deputy Commissioners may also take into account other factors on either side of the balancing.

- The final decision whether to admit the proffered hearsay is reached by comparing the strength of the parolee's interest concerning this particular evidence to the state's good cause and determining which outweighs the other.

2. Defendants must provide a plan, within 60 days after policies and procedures have been negotiated, that contains the following components:

- Training must be provided to Deputy Commissioners, to parole agents and such other Division of Adult Parole Operations staff as Defendants believe are appropriate, and to attorneys representing parolees in revocation proceedings.

    - Plans for initial training should give serious consideration to contracting for the services of professional trainers with experience in evidentiary law and/or administrative proceedings willing to adopt

curriculum that results from the parties' efforts. If Defendants propose not to employ this method, they must provide a detailed description of enhanced training that will be as rigorous as training that would be provided under such a contract, and the Special Master must approve such a proposal.

- Plans for initial training must include expeditious timelines for delivering the training and must identify the amount and source of funding necessary to carry it out.

- Continuing education on applying the legal standards concerning confrontation rights to revocation proceedings must be provided, annually at a minimum, for all of the above-described staff and contract attorneys.

- Deputy Commissioners must meet minimum standards in order to conduct the complex task of revocation hearings. Defendants' plan must define those minimum standards; the methods by which Defendants will determine whether Deputy Commissioners have met the standards; and the methods by which Defendants will determine whether Deputy Commissioners conducting revocation hearings continue to meet the standards, assessed at regular intervals and, at a minimum, annually.

- Defendants' plan must include conducting a qualitative assessment, at regular intervals,

of whether Deputy Commissioners are applying the standards within an acceptable range of discretion. This effort should include at least these components:

- Develop, either internally or in conjunction with the administrators of the attorney panel representing parolees in revocation proceedings, an information system solution to support assessments. That system must capture information sufficient for Defendants to conduct systematic examinations of substantive due process questions. It must also permit aggregate analysis, identification of trends, sorting and reporting by relevant factors, and individual case analysis.

- For each Deputy Commissioner conducting revocation hearings, Defendants' reviewers must observe him or her in those hearings at least twice annually.

- The assessment must include an examination of what further training or remediation is needed for an individual or for staff more generally. That training should be provided expeditiously.

- A system of remediation must include following the CDCR progressive discipline system. It should emphasize further training and counseling to develop an individual's skills, and make use of letters of instruction and further methods when necessary.

- Any components of this plan that can practically be implemented independently must be implemented shortly after the parties reach agreement. They must not be held in abeyance pending completion of the full plans required under these orders.

- Development of these policies, procedures, training, and plans shall proceed under the guidance of the Special Master. The Special Master or a Deputy Special Master shall lead negotiation sessions.

  Alternatively, the parties may agree to negotiate in the absence of the Special Master and provide monthly progress updates, unless and until the Special Master determines that progress is unsatisfactory under this arrangement, at which time the Special Master would become involved in the negotiations.

C. No order is warranted concerning deferring hearings to obtain more competent evidence.

D. Representation for appeals is not required under the Permanent Injunction and is funded for only one type of potential violation. While Defendants' practices concerning confrontation rights are deficient and do not appear remediable without further Court oversight, Defendants have proceeded in good faith and there is no evidence that deficiencies are so egregious that they cannot be addressed without first attempting the remedies ordered above.

- Plaintiffs' request to require the state to fund representation for writs of *habeas corpus*

challenging decisions to admit contested evidence should be denied.

Respectfully submitted,

_/s/Chase Riveland
Chase Riveland
Special Master DATED: February 8, 2008

INDEX TO EXHIBITS

Ex. A Stipulated Order for Permanent Injunctive Relief

Ex. B Reporter's Transcript of 12/14/07 Hearing, with its exhibits

Exhibit 1 – Notice of Motion and Motion to Enforce Paragraph 24 of the *Valdivia* Permanent Injunction

Exhibit 2 – Defendants' Opposition to Plaintiffs' Motion to Enforce Paragraph 24 of the *Valdivia* Permanent Injunction

Exhibit 3 – Plaintiffs' Reply in Support of Plaintiffs' Motion to Enforce Paragraph 24 of the *Valdivia* Permanent Injunction

Exhibit 4 – Defendants' Response to Plaintiffs' Reply to Opposition to Motion to Enforce Paragraph 24 of the *Valdivia* Permanent Injunction

Ex. C CDCR Resource Documents 1, 2, 3

Ex. D Declaration of Loren G. Stewart in Support of Plaintiffs' Motion to Enforce Paragraph 24 of the *Valdivia* Permanent Injunction

Ex. E Board of Parole Hearings Deputy Commissioner Training 12/20/07

Ex. F Reply Declaration of Loren G. Stewart in Support of Plaintiffs' Motion to Enforce Paragraph 24 of the *Valdivia* Permanent Injunction, with some of its exhibits

Exhibit 2 – Defendants' letter dated June 8, 2007

Filed Under Seal

Ex. A-Sealed Reply Declaration of Ernest Galvan in Support of Plaintiffs' Motion to Enforce Paragraph 24 of the *Valdivia* Permanent Injunction, with some of its exhibits

Exhibit 1 First Report of the Special Master on the Status of Conditions of the Remedial Order

Exhibit 3 – CDCR *Valdivia* Monitoring Report Santa Rita County Jail

Exhibit 4 – CDCR *Valdivia* Compliance Report 9/26/07

Exhibit 5 – Board of Parole Hearings Deputy Commissioner Workshop 3/27/07

Ex. B-Sealed Reply Declaration of Anne Mania in Support of Plaintiffs' Motion to Enforce Paragraph 24 of the *Valdivia* Permanent Injunction

Ex. C-Sealed	Reply Declaration of Kristen Palumbo in Support of Plaintiffs' Motion to Enforce Paragraph 24 of the *Valdivia* Permanent Injunction, with some of its exhibits Exhibit 3 – Form BPH 1103 for Parolee 3
Ex. D-Sealed	Reply Declaration of Shirley Huey in Support of Plaintiffs' Motion to Enforce Paragraph 24 of the *Valdivia* Permanent Injunction, with its exhibit Exhibit 1 – Transcript of Revocation Hearing for Parolee 1
Ex. E-Sealed	Declaration of Shirley Huey in Support of Plaintiffs' Notice of Motion and Motion to Enforce Paragraph 24 of the *Valdivia* Permanent Injunction
Ex. F-Sealed	Plaintiffs' Notice of Lodging of Revocation Hearing Transcripts
Ex. G-Sealed	Transcript of Revocation Hearing for Parolee 3
Ex. H-Sealed	Transcript of Revocation Hearing for Parolee 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JERRY VALDIVIA, ALFRED YANCY, and HOSSIE WELCH, on their own behalf and on behalf of the class of all persons similarly situated,

Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, Governor of the State of California, et al.,

Defendants. /

NO. CIV. S-94-671 LKK/GGH

ORDER

(Filed Mar. 25, 2008)

On February 25, 2008, the Special Master filed his report and recommendations regarding the use of hearsay evidence in parole revocation proceedings. *See* Permanent Injunction, at 6. The defendants have filed objections to the Special Master's report; the plaintiffs encourage the court to adopt it, with modification. The court declines both parties' requests and adopts the Special Master's report and recommendations.

Despite defendants' objections, the court agrees with the Special Master's interpretation of *United States v. Comito*, 177 F.3d 1166 (9th Cir. 1999), *United States v. Hall*, 419 F.3d 980 (9th Cir. 2005) and related hearsay cases in this Circuit, and their application to the defendants' parole revocation proceedings.

His findings of fact are supported by the record. The Special Master's recommendations appear to the court well-calculated to ensure the due process protections as expressed by the Supreme Court and the Ninth Circuit are respected. All of defendants' objections are overruled.

Plaintiffs' principally request that the Special Master's recommendations be amended to include concrete deadlines by which the defendants must accomplish certain remedial measures.[1] The court declines to do so and defers to the Special Master, in his conscientious attention to and intimate knowledge of the case, to ensure that the remedial measures ordered are completed expeditiously.

Accordingly, the court ORDERS:

1. The court ADOPTS the Special Master's Report and Recommendations Regarding Motion to Enforce Paragraph 24 of the *Valdivia* Permanent Injunction (Docket No. 1398);

2. The parties SHALL undertake the acts recommended by the Special Master at pp. 26-29 of the Report. The court defers to the Special Master to ensure these acts are timely accomplished. Should he believe necessary, the

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[1] The plaintiffs also request the court modify the Report to state that the denial of plaintiffs' motions are made without prejudice. It appears that this is apparent by the language employed by the Special Master and that such modification is unnecessary.

Special Master may move the court to require specific deadlines.

IT IS SO ORDERED.

DATED: March 25, 2008.

/s/ Lawrence K. Karlton
LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES
DISTRICT COURT

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JERRY VALDIVIA, ALFRED YANCY, and HOSSIE WELCH, on their own behalf and on behalf of the class of all persons similarly situated,

Plaintiffs-Appellees,

v.

ARNOLD SCHWARZENEGGER, Governor of the State of California, and the STATE OF CALIFORNIA

Defendants-Appellants.

No. 08-15889

D.C. No. 2:94-CV-00671-LKK-GGH Eastern District of California, Sacramento

ORDER

Filed September 28, 2010

Before: John T. Noonan, Michael Daly Hawkins and Milan D. Smith, Jr., Circuit Judges.

Order;
Dissent by Judge Bea

ORDER

Judge Noonan recommended granting Appellants' Petition for Rehearing En Banc. Judge Hawkins recommended denying the Petition. Judge M. Smith voted to deny the Petition. The full court was advised of the Petition for Rehearing En Banc and a judge of

the court requested a vote on whether to rehear the case en banc. The en banc call failed to receive a majority of votes by active judges in favor of en banc consideration. Fed. R. App. P. 35.

The Petition for Rehearing En Banc is DENIED.

BEA, Circuit Judge, dissenting from the denial of rehearing en banc, joined by O'SCANNLAIN, TALLMAN, CALLAHAN, IKUTA, and N.R. SMITH, Circuit Judges:

The Supreme Court has told us the Constitution's due process requirements for a proper parole revocation hearing[1] are *less* than the requirements for a proper criminal trial. *Morrissey v. Brewer*, 408 U.S. 471, 488-89 (1972) (stating that the Supreme Court did not intend to "equate . . . parole revocation to a criminal prosecution in any sense"). This only makes sense. A parolee has already been convicted. His freedom is a matter of grace; it is a privilege extended in an attempt to rehabilitate him. A criminal defendant, however, is presumed innocent; his freedom is a matter of right. His conviction would deprive him of his liberty.

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[1] "Parole, probation, and supervised release revocation hearings are constitutionally indistinguishable and are analyzed in the same manner." *United States v. Hall*, 419 F.3d 980, 985 n.4 (9th Cir. 2005).

Today, the Ninth Circuit leaves in place a decision that affords *greater* due process protection as to evidence offered against parolees than as to evidence offered against criminal defendants. Under the majority decision of the panel, nontestimonial hearsay evidence, which would be admissible against a criminal defendant without any violation of the defendant's constitutional evidentiary rights, is *inadmissible* against a parolee in a parole revocation hearing unless the State can show "good cause" to deny the parolee his right to confrontation as stated in *United States v. Comito,* 177 F.3d 1166 (9th Cir. 1999).[2]

An example may help. Sally calls 911 and exclaims, "My husband Bob just shot me!" At Bob's trial for attempted murder, the prosecutor calls the 911 dispatcher to testify as to what Sally said when she called 911. Sally's hearsay statement is admissible; it is nontestimonial, so the Confrontation Clause of the Sixth Amendment does not bar its admission. *See Davis v. Washington,* 547 U.S. 813, 827-28 (2006) (holding that statements made by a domestic abuse victim to a 911 operator are nontestimonial when made during an ongoing emergency). Further, Sally's

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[2] The balancing test set forth in *Comito* – our version of "good cause" – requires hearing officers to "weigh the [parolee's] interest in his constitutionally guaranteed right to confrontation against the Government's good cause for denying it" before admitting hearsay evidence at a parole revocation hearing. *Comito,* 177 F.3d at 1170.

hearsay statement is an excited utterance, so it is admissible under Federal Rule of Evidence 803(2).

But what if Bob were on parole when Sally called 911 and the State simply wanted to revoke his parole? According to the panel's majority decision, Sally's hearsay statement is not admissible unless the State can show what constitutes "good cause" in our circuit to deny Bob his right to confront Sally.

This result is odd in theory and still more odd in practice. I thus respectfully dissent from the denial of rehearing en banc.

I

The Due Process Clauses of the Fifth and Fourteenth Amendments provide minimum procedures the States must provide during parole revocation proceedings. *Morrissey*, 408 U.S. at 487-89. These minimum procedures are meant to "assure that the finding of a parole violation will be based on verified facts." *Id.* at 484. One of the minimum requirements of due process in a parole revocation hearing is "the right [of the parolee] to confront and cross-examine adverse witnesses." *Id.* at 489.[3]

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[3] The *Morrissey* Court went on to state that due process does not require confrontation if "the hearing officer specifically finds good cause." 408 U.S. at 489. Read in context, the requirement that the parolee must have an opportunity to confront witnesses unless the hearing officer finds good cause is applicable only if the parolee would otherwise be entitled to confront

(Continued on following page)

To determine "whether the admission of hearsay evidence violates [a parolee's] right to confrontation in a particular [parole revocation] case, the court must weigh the [parolee's] interest in his constitutionally guaranteed right to confrontation against the Government's good cause for denying it." *Comito*, 177 F.3d at 1170. The weight of the parolee's interest in his due process right to confrontation depends on two factors: (1) "the importance of the hearsay evidence to the court's ultimate finding," and (2) "the nature of the facts to be proven by the hearsay evidence." *Id.* at 1171. On the other side of the balancing test, to determine whether good cause exists, a court must look to "both the difficulty and expense of procuring witnesses and the traditional indicia of reliability borne by the evidence." *Hall*, 419 F.3d at 988 (internal quotation marks omitted).

Later, in *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court altered the way in which the right to confrontation is defined under the Sixth Amendment. The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." U.S. Const. amend VI. The *Crawford* Court held that the admission of testimonial out-of-court statements against a criminal defendant violates the defendant's rights

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those witnesses. We must now read *Morrissey* in light of *Crawford v. Washington*, 541 U.S. 36 (2004), which redefined the scope of the confrontation right in the constitutional context.

under the Confrontation Clause of the Sixth Amendment unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. 541 U.S. at 68. No *Comito* or other type of balancing test is applied.

However, the Confrontation Clause does not apply to the admission of nontestimonial hearsay. *United States v. Sine*, 493 F.3d 1021, 1035 n.11 (9th Cir. 2007) (citing *Whorton v. Bockting*, 549 U.S. 406, 420 (2007) (stating in dicta that, "[u]nder *Crawford*, . . . the Confrontation Clause has no application to [nontestimonial] statements and therefore permits their admission even if they lack indicia of reliability")). Most hearsay exceptions cover statements that are, by their nature, not testimonial. *Crawford*, 541 U.S. at 56.

Examples of nontestimonial hearsay include: statements made to a 911 dispatcher during an ongoing emergency, *Davis*, 547 U.S. at 828; public records, such as records of conviction, *United States v. Weiland*, 420 F.3d 1062, 1077 (9th Cir. 2005); immigration judges' memoranda of oral decision, *United States v. Ballesteros-Selinger*, 454 F.3d 973, 975 (9th Cir. 2006); warrants of deportation and birth certificates, *United States v. Bahena-Cardenas*, 411 F.3d 1067, 1075 (9th Cir. 2005); and applications for permanent resident status, *United States v. Marguet-Pillado*, 560 F.3d 1078, 1085 (9th Cir. 2009). Further, "[b]usiness and public records are generally admissible absent confrontation . . . because – having been created for the administration of an entity's affairs

and not for the purpose of establishing or proving some fact at trial – they are not testimonial." *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2539-40 (2009).

A criminal defendant's right to confrontation derives from the Confrontation Clause of the Sixth Amendment, but a state-convicted parolee's right to confrontation derives from the Due Process Clause of the Fourteenth Amendment. The due process right to confrontation under the Fourteenth Amendment provides less protection to parolees during parole revocation hearings than the Confrontation Clause of the Sixth Amendment provides to defendants during criminal trials. *See Morrissey*, 408 U.S. at 488-89.

That does not mean the term "confrontation" should be interpreted differently in the Sixth Amendment context than it is in the Fourteenth Amendment context. Rather, the difference between the right to confrontation guaranteed by the Sixth Amendment and the right to confrontation guaranteed by the Fourteenth Amendment is whether the right is absolute. The Confrontation Clause of the Sixth Amendment provides an absolute bar to the admission of testimonial out-of-court statements unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. *Crawford*, 541 U.S. at 68. The due process right to confrontation under the Fourteenth Amendment, on the other hand, is not absolute. It is subject to the hearing officer's discretion where there are specific

good reasons for requiring confrontation. *Morrissey*, 408 U.S. at 489.

The purpose of the right to confrontation – whether under the Sixth or Fourteenth Amendment – "is to ensure reliability of evidence." *Crawford*, 541 U.S. at 61; *see Morrissey*, 408 U.S. at 484 (explaining that the goal of the due process right to confrontation is "to assure that the finding of a parole violation will be based on verified facts"). Further, the right to confrontation – whether under the Sixth or Fourteenth Amendment – "applies to 'witnesses' against the accused." *Crawford*, 541 U.S. at 51; *see Morrissey*, 408 U.S. at 489 (explaining that the due process right to confrontation applies to "adverse witnesses"). Because of the these similarities, "confrontation" should be interpreted to have the same meaning under the Fourteenth Amendment as it does under the Sixth Amendment.

Now criminal defendants have an argument that *Valdivia* requires us to extend *Comito* balancing to criminal trials – not as a right of confrontation, but as a due process right. That is, if the Due Process Clause of the Fourteenth Amendment guarantees to parolees the right to have a hearing officer conduct the *Comito* balancing test before he admits nontestimonial evidence, surely a criminal defendant, who has an even greater liberty interest, has a due process right to have a trial judge conduct the *Comito* balancing test before he admits the same evidence.

Crawford's elucidation of the limits of the Confrontation Clause should apply with equal force to the due process right to confrontation under the Fourteenth Amendment. Where *Crawford* permits the admission of evidence in a criminal trial, the evidence should necessarily be admissible in a parole revocation hearing. The panel's holding otherwise allows a hearing officer to exclude from a parole revocation hearing, based on the State's failure to show good cause for failure to present the witness in court, the same evidence that would be admissible without a showing of good cause to prove guilt at a criminal trial. Where *Crawford* would bar the admission of evidence in a criminal trial the evidence would not be admissible in a parole revocation hearing unless the government could show specific good reasons for not requiring confrontation.[4] *Morrissey*, 408 U.S. at 484, 489. Because this interpretation of the right to confrontation provides no greater protection to parolees in parole revocation hearings than to defendants in criminal trials, it is consistent with *Morrissey*.

This result is also consistent with *Comito*. The *Comito* balancing test applies only where the admission of hearsay evidence would implicate a parolee's

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[4] Although the *Comito* balancing test would apply to all testimonial hearsay evidence, evidence that falls within "long-standing exceptions to the hearsay rule," and would be admissible in a criminal trial, "should satisfy the lesser standard of due process accorded [a parolee] in a revocation proceeding." *Hall*, 419 F.3d at 987.

right to confrontation. *Comito*, 177 F.3d at 1170. Because not every hearsay statement is testimonial, not every such statement implicates a parolee's right to confrontation. Thus, a hearing officer should not apply the *Comito* balancing test to *all* out-of-court statements proffered by the government to prove the matter asserted during a parole revocation hearing, as the panel opinion would require. Rather, a hearing officer should apply the *Comito* balancing test only when the government proffers *testimonial* out-of-court statements. If the government proffers *nontestimonial* out-of-court statements, the right to confrontation is not implicated and the *Comito* balancing test is inapplicable.[5] Confrontation is required only as to testimonial evidence; it is not required as to nontestimonial evidence.

II

The panel majority opinion also creates a direct conflict with the Second Circuit. The Second Circuit has developed a two-part test to analyze the admissibility of hearsay evidence in a parole revocation hearing. *United States v. Williams*, 443 F.3d 35, 45 (2d Cir. 2006). Where the government proffers hearsay that would be *inadmissible* under an "established exception to the hearsay rule," the district court must

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[5] Of course, *Comito* did not draw a distinction between testimonial and nontestimonial hearsay. But that is attributable to the fact *Comito* was decided before *Crawford* redefined what confrontation means in the constitutional context.

"determine whether good cause exists to deny the defendant the opportunity to confront the adverse witness." *Id.* To make that determination, the court must balance "the defendant's interest in confronting the declarant" against "the government's reasons for not producing the witness and the reliability of the proffered hearsay." *Id.* This balancing test is similar to the *Comito* balancing test. However, where the government proffers hearsay that would be *admissible* in a criminal proceeding under an "established exception to the hearsay rule," no such "good-cause analysis" is required. *Id.* The *Valdivia* majority opinion directly conflicts with this rule.

The Second Circuit's approach to the admission of hearsay statements in parole revocation hearings is more consistent with *Morrissey* than is the panel's majority approach, because the Second Circuit does not require hearing officers to apply a *Comito*-like balancing test to *all* hearsay evidence the government proffers in a parole revocation hearing. Thus, in most instances, the Second Circuit does not provide parolees with greater confrontation rights to bar proffered evidence than criminal defendants have. Criminal defendants have no right to confrontation or to bar admission of evidence when the government proffers nontestimonial hearsay, admissible under a hearsay exception, during a criminal trial. Similarly, under the Second Circuit's approach, parolees have no right to confrontation or to bar admission of evidence where the government proffers evidence that falls within an "established exception" or "firmly rooted"

exception to the hearsay rule. These two inquiries – whether a statement is testimonial and whether a statement falls within an established hearsay exception – often overlap, because most established hearsay exceptions cover statements that are nontestimonial in nature. *See Crawford*, 541 U.S. at 56.

However, in some instances, the Second Circuit's approach may provide parolees with greater confrontation rights than criminal defendants. For example, a statement that is nontestimonial and does not fall within a firmly rooted hearsay exception (e.g., the residual exception, Federal Rule of Evidence 807) would not raise any Confrontation Clause issues at a criminal trial, but the Second Circuit would still require the government to show good cause for not allowing confrontation with respect to the same statement in a parole revocation hearing. Therefore, even though the Second Circuit's approach is more consistent with *Morrissey* than the panel's approach, there are still situations in which the Second Circuit does create a barrier to the admission of hearsay statements in a parole revocation hearing that is higher than the constitutional barrier to the admission of the same statements in a criminal trial.

A second problem with the Second Circuit's approach is that it requires hearing officers to determine which state hearsay exceptions are "firmly rooted" or "established." Although courts were required to make such determinations before *Crawford*, the only question courts are now required to answer with respect to the Confrontation Clause of the Sixth

Amendment is whether the hearsay was testimonial. *See Crawford*, 541 U.S. at 60, 68-69.

Rather than breathe life into the practice of determining which state hearsay exceptions are "firmly rooted" or "established," *Crawford*'s test – whether the hearsay evidence is testimonial or not – should be used to determine whether a hearing officer in a parole revocation hearing must apply the *Comito* balancing test. Hearing officers can rely on post-*Crawford* cases to determine whether hearsay evidence is testimonial.

III

The panel opinion conflicts with *Morrissey* by providing parolees with *greater* rights than the Constitution affords criminal defendants. Neither the Constitution nor common sense requires this result. For these reasons, I respectfully dissent from the order denying rehearing en banc.